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USNRDT
v.1

CASES AT LARGE

CONCERNING

TITHES;

CONTAINING

All the RESOLUTIONS of the respective COURTS of EQUITY, particularly those of the EXCHEQUER, taken from the printed REPORTS, and MANUSCRIPT COLLECTIONS, mostly by Sir SAMUEL DODD, late Lord CHIEF BARON; never before published;

Together with

All the APPEALS in the HOUSE of LORDS, to and in *Trinity* Term, 22 *Geo.* III.

To which is prefixed,

An INTRODUCTION, comprehending a concise View of the whole Law of TITHES, with Observations on several Cases of APPEAL, that have been adjudged within the last ten Years, of his present Majesty's Reign;

Likewise

A full VINDICATION of the CLERGY, respecting their SUITS for TITHES:

ALSO

An APPENDIX of ACTS of PARLIAMENT, With *Readings*, particularly on Stat. 13 *Eliz.* chap. 10. and chap. 20. on which Acts, and the Construction of them, depends the whole Learning respecting, and the Validity of, all Alienations of Ecclesiastical Livings at this Day.

The Whole upon an entire new PLAN, and digested in a CHRONOLOGICAL SERIES; with proper TABLES of the CASES, &c. and a complete copious INDEX to the PRINCIPAL MATTERS.

By JOHN RAYNER, of the INNER TEMPLE.

IN THREE VOLUMES.

VOLUME I.

"*Non modò quidem fide, sed diligentiâ solummodo.*"

Sir HEN. SPELMAN.

LONDON:

Printed by W. STRAHAN and W. WOODFALL, Law Printers to his Majesty;

For RICHARDSON and URQUHART, *Royal Exchange.*

MDCCLXXXIII.

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The PREFACE.

NO complete collection of caſes, reſpecting TITHES in particular, having been ever yet publiſhed, a preface ſeems neceſſary, to beſpeak the reception of that, which is now preſented to the world.

The compiler preſumes there needs no apology to be made, for the deſign of the work itſelf, as the nature of the ſubject muſt draw the attention, not only of the whole body of clergy, but alſo of all perſons whomſoever, intitled to receive, or liable to the payment of tithes.

Whoever is in the leaſt converſant with this matter, cannot but lament, as an unhappy ſpectator, the diſputes, that have ariſen reſpecting tithes, between the parſon and his pariſhioners, throughout this kingdom, the animoſities they have occaſioned among many private families; the jealouſy of the former, in conſidering himſelf, as deprived of his juſt rights, and of the latter, in thinking themſelves greatly impoſed upon, by the demands of the former.

Theſe differences, it is well known, have been productive of ſuch improper conduct

and example, on the part of the clergyman, in many pariſhes, as rather leſſened the dignity of his ſacred office, and rendered him moſt unhappy, as he was, in conſequence thereof, obliged to act, in a manner, ſeemingly derogatory, both to his cloth and calling.

Theſe ſheets, it is hoped, will, in ſome degree, be the means of reconciling ſuch jarring intereſts, and of ſoftening ſuch untoward diſpoſitions; and that too, on ſuch a laſting foundation, as to render the future interruption of it ſcarcely poſſible, unleſs from choice and deſign; for in the following papers will be found almoſt every queſtion, that has ariſen on the ſubject, ſatisfactorily and finally ſettled, as well in the court of *Chancery*, as *Exchequer*, in the Eccleſiaſtical court, as before juſtices of peace: the compiler indeed has not been ſo particular in the eccleſiaſtical, as in the other courts of juſtice, becauſe the cognizance of tithes in that court, is very much limited and reduced; beſides, the clergy may be preſumed to be rather better acquainted with the proceedings in the eccleſiaſtical, than in any of the other courts.

The reader will find in the following code, the full, able, genuine, and ſcientific arguments of the gentlemen of the long robe, and the moſt clear, unequivocal, and ſatisfactory deciſions of (1) judges, of as great character for

(1) See Table of lords chancellors, *&c.* prefixed to this volume.

abili-

abilities and integrity in their profeſſion, as ever ſat on the reſpective benches of the ſuperior courts; and thoſe too given upon the moſt mature deliberation, as well as the ſolemn and final judgments of the ſupreme judicature in this country, on every important queſtion, that hath ariſen, on that firſt of temporal concerns to the clergy, *viz.* their right to tithes.

Among the arguments of the counſel, and the reſolutions, orders, and decrees of the ſuperior courts in *Weſtminſter* hall, and the final judgments of the Houſe of Lords, in their appellant juriſdiction, the dernier and moſt ſatisfactory reſort of the ſubject, will be found debated and finally adjudged, what is due to the clergy, in their right to tithes, and alſo what means are to be purſued, in order to obtain ſuch right.

The caſes on appeal, (which make no inconſiderable part of theſe ſheets, whether their quantity or quality be principally regarded,) are not to be found, in any other collection, hitherto publiſhed. There cannot be more ſolemn determinations laid before the readers; for how can caſes be ſtamped with an higher degree of (1) authority, than thoſe determined by the integrity, wiſdom, and juſtice, of the peers of the realm, oftentimes upon a previous conſultation, with all the judges of *England?*

(1) See *Dougl.* Rep. 632.

Theſe ſheets will convince all unbiaſſed readers, how unjuſtly the clergy have been charged with a litigious diſpoſition, in having acted, contrary to the meekneſs and forbearance, enjoined them, by the mild precepts of the holy goſpel, in ſuing their pariſhioners, for the recovery of their tithes; it will appear by theſe papers, to have been ſettled, that a parſon has a right to appeal to the laws of his country, for withholding his tithes from him, be they of ever ſo (1) inconſiderable amount; an inſtance will be produced, in which tithes have been withheld, whereby the vicar has been obliged to ſubſiſt on the (2) charity of the pariſhioners. Sure when the clergy found their predeceſſors thus hardly treated by their pariſhioners, it became a duty to themſelves, their families, and their ſucceſſors, to ſue the pariſh, rather than ſtarve, even in oppoſition to the commands of the goſpel, if ſuch procedure can be conſidered, as a diſobedience of the divine precept, and if ſuch can be the reaſonable conſtruction of that part of our bleſſed Lord and Saviour's benevolent injunction. Theſe ſheets will ſhew, that the hard hand of proud oppreſſion, hath been, more than once, exerted, merely to deprive the parſon of his due, and his pariſhioners encouraged in perſon-

(1) P. 342.
(2) P. 763, 764.

al insults on him, when he came to demand his tithes. See our observations on the case of parson (1) *Bosworth*, and of parson (2) *Devis*.

The reader will here find the parson, struggling with becoming spirit, against wealth, power, and interest, ungenerously employed and that too, by some of the first characters in the kingdom, for the oppressive purpose of defeating the parson of his rights, by throwing every expence in his way, and all other obstacles, arising from the law's delay; and every reader will, to his great satisfaction, many to their advantage, observe, that the parsons earnest endeavours and laudable exertions were finally crowned with wished for success, and their opponents, though great in titles and honours, covered with shame, from a detection of the most mean and scandalous manœuvres, such as would disgrace even the pettifoggers of the law, in chicane, duplicity, ignorance, and (3) oppression.

The names of *Willis* (4) and (5) [redacted], cannot but be mentioned, much to their ho-

(1) Introd. cxxv. cxxvi.
(2) Introd. cxxvii. cxxviii.
(3) Introd. cxii. cxxxv.
(4) See P. 570.
(5) See P. 658.

nour, for the ſervice they have been of, to their ſucceſſors, as well as to themſelves, in cauſing new and important queſtions reſpecting the ſubject matter of tithe, to be unalterably ſettled.

In that invaluable part of the *Engliſh* conſtitution, "*an appeal to the Lords*," the great liberty of arguing and debating allowed to (1) counſel, the candour and patience with which they are heard, even on the moſt tender points, in this illuſtrious aſſembly, theſe peculiar circumſtances muſt convince the world of the ſingular happineſs of the ſubject in this country: but theſe papers will ſhew, a much more eſſential proof of the wiſdom, the integrity, the honour, and the candor of this eminently diſtinguiſhed court of judicature; for herein is recorded an unexampled inſtance of *Roman* virtue, and of ſtrict juſtice, in that, theſe auguſt judges, finding a poor pariſh prieſt had been deprived of his right, from his ignorance of it, from his poverty, from his inability to defend it, for a courſe of years; not only relieved him, but puniſhed the litigious party, litigious from his power, wealth, and authority, by awarding the injured, diſtreſſed, and abuſed individual, exemplary (2) coſts. What a glorious inſtance this, in the hiſtory of the due adminiſtration

(1) See *Pref.* to Sir *Barth. Shower's* Caſes in Parl.
(2) Introd cxx, cxxi.

of

of juſtice in *England*; that the meaneſt ſubject hath as fair an hearing, and as adequate ſatisfaction, from the peers of the realm, as even the members of their *own* body!

In what part of the globe, but in *England*, dare a poor pariſh prieſt, even think of complaining of ſuch a ſuperior, as a peer (1) of the realm; but ſhould he happen to be ſo preſumptuous, what court of juſtice would entertain ſuch a complaint! or, if they did, would they vouchſafe to hear it? but ſhould they *unfortunately* do both, *unfortunately*, I ſay, as it could only be for the purpoſe of harraſſing the parſon, with fatigue and expence, ſince no man in his ſober ſenſes, could reaſonably expect reparation, juſtice, or relief; nay moſt likely, he would not eſcape puniſhment for his raſhneſs, and audacity.

The next moſt material advantage of this work ſeems to be, that the reader will be able to aſcertain, whether what he is in ſearch of, is to be met with, in any of theſe volumes; for if he knows the name of the parſon, or pariſhioner, the alphabetical table of the names of the caſes, in front of this volume, gives him a complete catalogue of them; if he can only recollect the time, when the caſe happened, the chronological table of them will aſſiſt his recollection; if he happens to re-

(1) See Introd. cxxvi, cxxvii.

member

member the names of the *Judges*, before whom the diſpute came in judgment, a liſt of them is at hand; if he is acquainted with the *place*, wherein the conteſt aroſe, he will find a collection of them alſo; and laſtly, if he knows the *nature* of the *tithe*, or ſubject matter of diſpute, the copious Index of numerous references, to every poſſible article or head, in the work at large, that can almoſt be thought of, will furniſh him with ſuch ample aſſiſtance, that we think it next to impoſſible, for the reader to be totally defeated in his endeavours to learn, whether theſe volumes can afford him information in his inquiries. We ſhall have occaſion to ſpeak more, in explanation of theſe repertories, (1) hereafter.

Tranſlations. The tranſlations accompany the originals, in aſſiſtance of thoſe, who, though they may may have occaſion to conſult this work, may not happen to be at all verſed in languages; and the learned cannot, it is preſumed, be offended at them, as the originals are preſerved.

Remarks. The remarks can require no apology, even to the profeſſion, as they are ſubmitted, rather to ſhew the fallibility of human nature, than in cenſure of the objects of them.

Mention (2) being made of the Abbot of *Lyra*, reſpecting evidence, in matter of tithe;

(1) See *poſt* xvi.

(2) See P. 419.

I take leave to obſerve, that *Lira* or *Lyra* (1) is a benedictine abbey, in a town of the ſame name, in the dioceſe of *Eureux*, on the river *Rille* in *Normandy*, founded about the year 1045, and taxed to the apoſtolical chamber, at three hundred florins of gold for annates, it's uſual income is two hundred thouſand and ninety livres, with a right of preſenting to thirty churches.

Thomas Becket, Archbiſhop of *Canterbury*, and Lord Chancellor, reſided at *Lyra* for ſome time.

Advantage of the chronological method of this work, to the ſtudents of the law.

The chronological order of this work, may prove inſtructive as well as entertaining, to the ſtudents of the law; for they have thereby an opportunity of obſerving the progreſſive improvement of agriculture, from the gradual introduction of things titheable; and they may thereby alſo learn, how early *tithes* became the ſubject of litigation, in the *temporal* courts; that at firſt, the juriſdiction of the *Chancery*, was even doubted, but when recognized, every ſpecies almoſt of tithes, and every method of ſetting them out, the diſtinction between *great* and *ſmall* tithes, became ſubjects of diſpute, in courts of equity, but more ſo, in that of the *Exchequer*; and as learning and knowledge increaſed, ſo did the reaſons of judicial determinations, and received an improved ſhare of good ſenſe, and ſound doctrine; ſo that at this day, and in this book,

(1) *Nich. Bibl. Top. Brit.* No. vii. App. p. 107.

hardly

hardly a queſtion of the leaſt importance, as to tithes, but what is moſt ſolemnly ſettled, whereby we might well have intituled this work,

A

CODE OF EQUITY,

Reſpecting

TITHES.

Introduction. The Introduction comprehends a general conciſe view of tithes, particularly ſuch matters, as are not ſo methodically treated of, in the collection of caſes. The whole is referred to the caſes, eſpecially the modern ones, on appeal.

Having herein, preſumed to alter the text of the (1) *Commentaries* on the Laws of *England*, and as it is a very material alteration, I think it incumbent on me, to endeavour to convince the learned reader, that I have not taken this liberty, on my own *ipſe dixit*, for in a (2) book of ſome authority I believe, at the time of publication, I met with the following (3) paſſage.

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(1) See Introd. ii. n.

(2) Intituled, "The Great Caſe of Tithes, truly ſtated, clearly opened, and fully reſolved: by *Anthony Pearſon*, formerly a juſtice of peace, in *Weſtmorland*. Edit. 1761. Introd. xxxvii. n.

(3) In a premonition to the reader, xii, xiii.

"Not

" Not to detain the reader with too long a *preface,* nor repeat what is already ſaid, we may juſt remind him, that as, in the nature of the thing, a *precept* only, not an example for the payment of tithes, in their (1) *preſent* extent, muſt be produced in the *New* Teſtament, in order to make the claim good upon a *Chriſtian* bottom; ſuch a *precept,* or the want of one, muſt determine, whether this is or is not a part of the *Chriſtian* conſtitution; in a matter of ſo great concern, it were highly abſurd to ſuppoſe a poſitive *precept* would have been omitted by *Chriſt,* the founder of our religion, and his inſpired followers, if ſuch an exaction had been deſigned; *that there is no ſuch poſitive* precept *in the* New Teſtament, *is a truth in fact,* and therefore a negation of this exaction." Again, *Wickliffe,* the firſt divine in *Europe,* who had the ſenſe, honeſty, and reſolution, to attempt a reformation of religion, was of opinion, that tithes were merely (1) *alms, and by no means of goſpel inſtitution.*

Obſervations.

It has been thought proper and adviſeable, in order to induce the reader to entertain a favourable opinion, of the plan and execution of this work, to draw up, for the purpoſe of laying before him, OBSERVATIONS on ſome of the moſt important caſes, in this collection, but with what judgment is cheerfully, though diffidently, ſubmitted to the learning and candor, of the intelligent reader.

(1) The book was firſt publiſhed about the year 1657. Introd. xxxvii. n.

(2) *Berken.* Biogr. Lit. 83, 85. n.

Theſe

These observations are made upon such cases, as have been decreed in the court of EXCHEQUER, and finally adjudged, on appeal, to the House of Lords, all (except (1) one) in favour of the parson, and that too within the last ten years of his present Majesty's reign; these cases (with many more) are extracted from books, not generally to be met with, in the libraries, even of lawyers, much less in those of parsons, though they so materially affect the most important of all their worldly concerns.

This part of the work, the compiler flatters himself, will appear in some measure striking, or at least convince the readers of his diligence, and earnest desire, of inducing them, not only to peruse, but also to approve, his labours, from an hope, that they may profit by them; with this view, the compiler has particularly pointed out, in this part of his work, many resolutions and determinations never before brought into any of the courts of justice, nor ever communicated to the public, under the sanction of more distinguished authorities.

Supplement. The supplemental cases were added, partly from some having escaped our diligence, in the course of the work, partly from a wish of many gentlemen, that all the different reports of the

(1) *Fix. Travis* and *Whitbead.*

same

ſame caſe ſhould be inſerted, as ſome note-takers relate one point, ſome another, and thus they do ſo, will appear by the *index*.

The reader is deſired to obſerve, that he will find the caſes at large, in the ſupplement, that are only referred to, on the margin, in the body of the work.

The reſtraining act of (1) *Elizabeth*, being a law of univerſal concern to the clergy, we have therefore dwelt much longer, in our (2) obſervations on that ſtatute, than any other. Acts of parliament.

We cannot but here obſerve the inconvenience, Dr. *Burn* ſubjects his readers to, from his referring the acts of parliament, in the "Table of the ſtatutes," to the titles, under which they are inſerted, in his "*Eccleſiaſtical Law*" ſubjoined thereto, inſtead of, to the volume and page, as he does, in his "Table of caſes adjudged" in the ſame work; we ſpeak from experience, of the inconvenience alluded to, as the ſame not only gave us infinite trouble, but even baffled our reſearches, in ſome inſtances, as for example.

We could not find ſtat. 28 *Hen.* VIII. chap. 11. referred to "*Benefice*" under ſaid "Table

(1) Stat. 13 *Eliz.* chap. 10. See App. 1258.

(2) See App. 1261.

of

The caſe of *Arthington* and *Coverley*, is ſaid to have been determined *H.* Term, 6 *Geo.* II. *A. D.* 1732, in 2 Eq. Caſ. Abr. 518. pl. 3. 675. pl. 4. and in *M.* Term, 4 *Geo.* II. in 4 *Vin.* Abr. 550. pl. 10. whereas *A. D.* 1732, does not comport with either 4 or 6 *Geo.* II (1).

We cannot but obſerve, that, with reſpect to dates, *this year* hath been remarked for *ſeeming* (2) contradictions; for there were three different denominations of *this year* of our Lord, affixed to three ſtate papers, and which were all ſeverally publiſhed in one week, namely,

His Majeſty's ſpeech, dated 1732-3.
The addreſs of the Houſe of Lords, 1732.
The addreſs of the Houſe of Commons (3), 1733.

(1) Introd. xxxiii. n.

(2) There are doubtleſs ſome ſeeming contradictions occaſioned by the different cuſtoms among our chronologiſts, of beginning the year with 1 *January*, and 25 *March*; hence it is not unuſual to find, that the ſame perſon *died* on the ſame day of the month, for *two years ſucceſſively*; and the following abſurdities, as well as that reſpecting the year 1732, above noticed by us, (among others) were occaſioned by theſe different computations, *viz.* in the year 1667, there were *two Eaſters*, the firſt on the 25 *April*, and the ſecond of 25 *March* following. *Grang.* Pref. to Biogr. Hiſt. *Engl.* xiv. and n. Nomenclature of *Weſtminſter Hall*, ſubjoined to the Biogr. Hiſt. of Sir *William Blackſtone*, p. 8. n.

(3) *Grang.* and Nomenclature, *ut ante*.

Lord

Lord Chief Baron (1) *Comyn* cites the caſe of *Mills* and *Etheridge*, as determined 5 *February* 1726, in *H.* Term, 12 *Geo.* I. whereas *Bunbury* reports the ſame caſe, as determined 3 *February* 1725, *H.* 11 *Geo.* I.

That ſame judge reports the caſe of *Bury* corporation, and *Evans*, as heard 17 *May*, *E.* term; and ſame *Bunbury*, *July* 2, *T.* term.

The caſe of *Neute* and (2) *Chamberlain*, p. 364, was heard, according to *Viner*, 20 *Feb.* 1705, but according to *Browne*, *April* 6, 1706.

The late Sir *James Burrow* obſerves, that Sir *John Strange* is oftentimes wrong, as to *Trinity* (3) Term, during the reign of his late Majeſty,

(1) P. 218.

(2) P. 101.

(3) *Trinity* Term, *A. D.* 1734, reported by Sir *John Strange* [2 *Stra.* Rep. 977.] to fall in 7 *Geo.* II. did actually fall, according to Sir *James Burrow*, [*Bur.* Settl. Caſ. 7.] in 7 & 8 *Geo.* II. again, *Trinity* Term, *A. D.* 1747, fell, according to Sir *John Strange*, in 10 *Geo.* II. [2 *Stran.* Rep. 1075.] but according to Sir *James Burrow*, in 10 & 11 *Geo.* II. ſee *Bur.* Settl. Caſ. 107. again, *Trinity* Term, *A. D.* 1738, according to Sir *John Strange*, fell in 11 *Geo.* II. [2 *Stran.* Rep. 1092.] whereas Sir *James Burrow* informs us, that *that* Term fell in 11 & 12 *Geo.* II. ſee *Bur.* Settl. Caſ. 1092. again, this term, *A. D.* 1740, was in 13 *Geo.* II. according to Sir *John*, [2 *Stran.* 1133.] but Sir *James* ſays it fell in 13 & 14 *Geo.* II. *Bur.* Settl. Caſ. 150. pl. 50. So *Trinity* Term, *A. D.* 1741, was (ſays Sir *John*) in 14 *Geo.* II. but Sir *James* hath it in 14 & 15 *Geo.* II. ſee *Bur.* Settl. Caſ. 163. pl. 58. *T.* Term, *A. D.*

jeſty, King George the ſecond; and indeed, unleſs one knows the preciſe (1) day whereon *that* term begins, it is impoſſible to aſcertain, in what year of this King's reign, it happened to fall; as will appear from the following obſervations, made by the ſaid Sir *James* (2) *Burrow*.

I think

A. D. 1742, was in 16 *Geo.* II. according to Sir *James* [See *Bur.* Settl. Caſ. 187. pl. 66.] but in 15 *Geo.* II. according to Sir *John*, 2 *Stran.* Rep. 1167. Both Sir *James* and Mr. Serjeant *Wilſon* fixes *Trinity* Term, 1743, in 16 & 17 *Geo.* II. [See *Bur.* Settl. Caſ. 220. pl. 75. 1 *Wilſ.* Rep. 18.] in contradiction to Sir *John*, who fixes it in 16 *Geo.* II. 2 *Stran.* 1189. Both the ſaid reporters alſo differ with Sir *John*, as to *Trinity* Term, 1744, they making it fall in 17 & 18 *Geo.* II. [See *Bur.* Settl. Caſ. 256. pl. 80. 1 *Wilſ.* Rep. 75.] but Sir *John*, in 17 *Geo.* II. 2 *Stran.* Rep. 1210. Different years of the reign are aſſigned to *Trinity* Term, *A. D.* 1745, *viz.* 18 *Geo.* II. by Sir *John Strange*, [2 *Stran.* Rep. 1231.] 18 and 19 *Geo* II. by Mr. Serjeant *Wilſon* [1 *Wilſ.* Rep. 93, 105.] and 19 *Geo.* II. by Sir *James Burrow*. [See *Bur.* Settl. Caſ. 248. pl. 84.] Laſtly, *Trinity* Term, 1746, is announced to be in 19 *Geo.* II. by *Strange* [2 *Stran.* Rep. 1257.] in 19 & 20 *Geo.* II. by *Burrow* [See *Bur.* Settl. Caſ. 264. pl. 90.] and alſo by *Wilſon*. See *Wilſ.* Rep. 134.

(1) If *Charles* the *Second* his reign is conſidered to commence 30 *January*, *A. D.* 1648, (the decollation day of his royal father) when his Majeſty was King only *de jure* the firſt term, *tempore Car.* II. will be HILARY; if his reign commenced only from his RESTORATION, when he firſt became a King *de facto*, then *Eaſter* Term was the firſt Term, in his reign. See *Sid.* Rep. 2.

(2) *Trinity* Term, A. D. 1736, Sir *John Strange* ſays, fell in 9 *Geo.* II. [2 Stra. Rep. 1044], but Sir *James Burrow* obſerves,

I think it will be much ſafer for the reader, to attend to the dates of the year, than to thoſe of the reign, of ſuch caſes as occur within the time of the uſurpation.

I have only to remark, as to this table, that the names being ſo often repeated, initials were thought ſufficient, in the latter part of it; theſe initials however, will lead the reader to the alphabetical table of them, in which he will find them all at full length. Table of the judges.

The Index refers the reader, to all the equitable determinations, concerning tithes, and particularly to thoſe heard in the *Exchequer*, and finally adjudged in the Lords; but though they are very minutely referred to, yet the reader will find, beſides, references to much learning on the ſubject, in our having paid great attention to the reaſons aſſigned by the appellants and reſpondents, on their reſpective caſes, in order to induce the lords to affirm or reverſe the ſeveral decrees, or orders of the reſpective courts of equity in *Weſtminſter hall*; theſe reaſons were drawn up after the Index.

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obſerves, that this term did not begin till *Friday* 23 *June* this year, conſequently the whole of it fell within 10 *Geo.* II. for his Majeſty's acceſſion happened 11 *June*, 1727. See *Bur.* Settl. Caſ. 87. Again, *Trinity* Term A.D. 1739, fell, according to Sir *John Strange*, in 12 *Geo.* II. [2 Stra. Rep. 1111.] but this Term, Sir *James* ſays, did not this year begin till 22 *June*, 1739, ſo that the whole of this Term was within 13 *Geo.* II. *Bur.* Settl. Caſ. 132. pl. 42.

cauſes

cauſes had been learnedly argued in the ſuperior courts below, and after oftentimes the judges of thoſe courts, had *ſeriatim* delivered their opinions, in moſt ſolemn arguments; and not only ſo, but they were alſo afterwards ſettled upon the matureſt deliberation, by the moſt eminent gentlemen of the long robe; theſe reaſons therefore, the compiler of the index was of opinion, were of too great weight and conſequence, not to be very minutely referred to therein, or indeed more properly, were moſt valuable, as putting the reader in poſſeſſion of a very authentic and ſcientifical fund of learning, on all the various and complex queſtions, in matters of tithe, together with the moſt ſatisfactory ſolution of them; for it is to be preſumed, that the reaſons aſſigned on the caſe of the party ſucceeding, were moſt probably the reaſons that had great weight with, if they did not lead the Houſe of Lords to form their (1) judgment, and that the legal knowledge diſplayed in them met with the approbation of the houſe; but I would by no means be underſtood to inſinuate hereby, that the law laid down in the reaſons aſſigned on the caſes of the unſucceſsful party, was not conſidered as ſound doctrine; though the reaſons drawn therefrom were held inſufficient for ſucceſs, and were, in all probability, ſo deemed, even by the counſel who adopted them.

(1) See Introd. cxxiii.

To

This concise history of the judicial preferments, and characters of the works of those lawyers, whose writings are cited in the course of these volumes, the compiler submits must have their use, as they will point out to the uninformed, such particulars, respecting the authenticity of this work, as most likely will cause him to rely with rather more confidence on the vouchers, whenever he meets with any thing to his purpose in these sheets; and to such as need no such information, this history will convince them of the diligence and attention of the compiler, in this part of his labours, for the benefit of the student of the law. Authorities.

To conclude; the proprietors have foregone no expence to render this work worthy the patronage of those, for whom it was originally designed; and the compiler hopes his industry and perseverance will be too conspicuous, not to merit, in some measure, the approbation of the public; as he has great reason to believe, that not a single case in print, at the time this work was compiling, is omitted, nor has he any reason to think, that any case has been published since, because he has made it his particular business to inquire, and he could only hear of one single case, and a very slight and imperfect account even of that; however, he learnt it was a case on the circuit, and if a common law case, not within the plan of this compilation.

Trinity Term.
23 *Geo.* III.
A. D. 1783.

JOHN RAYNER.

ADVERTISEMENT.

THE compiler of theſe volumes, ſhould eſteem it a very particular favour, and himſelf moſt highly obliged, to the reverend order of Clergy, if they would condeſcend to tranſmit him, to Meſſrs. *Richardſon* and *Urquhart*, Bookſellers, at the *Royal Exchange*, *London*, an account of ſuch Monumental Inſcriptions, as may be met with, in their reſpective pariſhes, of thoſe perſons, who appear thereby, to have been either, to take them in alphabetical order,

Attornies General
Attornies of the ward
Attornies of the dutchy
Barons of the *Exchequer*
Chancellors
Chiefs of the reſpective courts of *King's Bench*, *Common Pleas*, or *Exchequer*
Commiſſioners of the great ſeal
Juſtices of either bench
Keepers of the great ſeal
Maſters of the rolls
Maſters of the wards
Maſters of the requeſts
Members of any of the Inns of Court, or Law Societies
Recorders of *London*, or other places
Serjeants at law
Solicitors General

INTRO-

INTRODUCTION.

We purpoſe to take a conciſe View of the Subject, under the following Particulars:

I. *The Original of the Right of Tithes in* England.

II. *Of the ſeveral Kinds of Tithes, with their Natures and Properties; and herein of Agiſtment Tithe, of the Diſtinction between Great and Small Tithes; and of the Manner of ſetting them out.*

III. *To whom they are due; and herein of Tithes in extra parochial Places.*

IV. *Who may be diſcharged or exempted from the Payment of Tithes; and herein of Compoſitions real, Cuſtoms, or Preſcriptions, and* Moduſes.

V. *Remedy for the Recovery of Tithes.*

VI. *Obſervations on ſome ſpecial Caſes of Tithes, decided in Favour of the Clergy, during the preſent Reign.*

VII. *Vindication of the Clergy from the Aſperſions caſt on them, on account of their Suits for Tithes.*

I. *The Original of the Right to Tithes in* England.

I Will not (*ſays Sir* WILLIAM (1) BLACKSTONE) put the title of the clergy to tithes upon any

Blackſtone ſays that the title of the clergy to tithes certainly commenced in divine right.

(1) 2 *Black.* Com. 25.

divine (1) right, though ſuch a right certainly commenced, and I believe (*ſays the ſame learned judge*) with the *Jewiſh* Theocracy; yet an honourable and competent (2) maintenance for the miniſters of the goſpel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be; for beſides the poſitive precept of the OLD (3) Teſtament, natural reaſon will tell us, that an order of men, who are ſeparated from the world, and excluded from other lucrative profeſſions, for the ſake of the reſt of mankind, have a right to be furniſhed with the neceſſaries, conveniencies, and moderate enjoyments of life, at their expence, for whoſe (4) comfort they forego the uſual means of procuring them; accordingly all municipal laws have provided a liberal and competent maintenance for their national prieſts or clergy; ours in particular have eſtabliſhed this of tithes, probably in imitation of the *Jewiſh* law; and perhaps, conſidering the degenerate ſtate of the world in general, it may be more beneficial to the *Engliſh* clergy to found their title on the law of the land, than upon any di-

All laws provide for the clergy.

Tithes eſtabliſhed probably in imitation of the *Jewiſh* law.

(1) A *jure divino* right to tithe ſeems only the dream of champion *Ridley*, and other advocates of his opinion. See *Gr.* and *Rud.* of L. and E. 337.

(2) Tithes in their original inſtitution were deſigned for the ſupport of the officiating clergy, in their reſpective pariſhes, and although they were frequently annexed to religious houſes, yet ſome proviſion was always made for the parſon who actually performed the duty; it was incumbent upon the religious houſe to make a reaſonable proviſion for the vicar, Lord *Brownlow* and *Devie*, *T.* 22 *Geo.* III. p. 1076.

(3) The original reading in the text is NEW *Teſtament*, but we have preſumed to ſubſtitute OLD, upon the following ſcriptural authorities, *viz.*

Levit. xxvii. 32.
Numb. xxiv. 28.
Deuter. xii. 6. 11, 12, 13, 28. xxvi. 12.
2 *Chron.* xxxi. 5, 6, 12.
Nehem. x. 37, 38. xiii. 5, 12.
Am. iv. 4.
Mal. iii. 8, 10. See our Preface.

(4) 2 *Black.* Com. 25.

vine

vine right whatſoever, unacknowledged and unſupported by temporal ſanctions.

When tithes were firſt introduced cannot be preciſely aſcertained.

We cannot preciſely aſcertain the time, when tithes were firſt introduced into this country; poſſibly they were cotemporary with the planting of Chriſtianity among the *Saxons*, by *Auguſtin* the monk, about the end of the ſixth century; but the firſt mention of them which Sir *William Blackſtone* has met with in any *Engliſh* written law, is in a conſtitutional decree made in a ſynod held in the year 686, wherein the payment of tithes in general is ſtrongly enjoined; this canon or decree, which at firſt bound not the laity, was effectually confirmed by two kingdoms of the heptarchy in their parliamentary conventions of eſtates, reſpectively conſiſting of the king of (1) *Mercia* and *Northumberland*, the biſhop, duke, maſters, and people; which was a few years later than the time that *Charlemagne* eſtabliſhed the payment of them in *France*, in the year 778; and made that famous diviſion of them into four parts; one to maintain the edifice of the church, the ſecond to ſupport the poor, the third the biſhop, and the fourth the parochial (2) clergy.

Firſt mention of them in the Engliſh laws.

Charlemagne eſtabliſhed tithes in *France* A. D. 778, and made the famous diviſion of them into four parts.

(1) *Offa* a king of *Mercia* (the moſt potent of all the *Saxon* kings of his time in this iſland) about the year 794, made a law, whereby he gave unto the church the tithes of all his kingdom; which, the hiſtorians tell us, was done to expiate for the death of *Ethelbert*, King of the *Eaſt Angles*, whom, in the year 793, he had cauſed baſely to be murdered. 3 *B.* E. L. 374.

This law of *Offa* was that which firſt gave the church a civil right in tithes in this land, by way of property and inheritance, and enabled the clergy to gather, and recover them as their legal due, by the coercion of the civil power. *Id. ib.*

Yet this eſtabliſhment of *Offa* reached no further than to the kingdom of *Mercia*, over which *Offa* reigned; until *Ethelwulph*, about ſixty years after, enlarged it for the whole realm of *England*. *Id. ib.*

(2) 1 *Black.* Com. 384, 385. 2 *Black.* Com. 26.

Tithes are mentioned in the *Fœdus Edwardi & Guthruni.*

The next authentic mention of them is in the *Fœdus Edwardi et Guthruni*, or the laws agreed upon between King *Guthrun* the *Dane*, and *Alfred*, and his ſon *Edward* the elder, ſucceſſive Kings of *England*, about the year 900; this was kind of treaty between thoſe monarchs, which may be found at large in the *Anglo Saxon* laws; wherein it was neceſſary, as *Guthrun* was a *pagan*, to provide for the ſubſiſtence of the *Chriſtian* clergy under his dominion; and accordingly we find, the payment of tithes not only *enjoined*, but a *penalty* added upon non obſervance; which law was ſeconded by the laws of *Athelſton*, about the year 930; and this is as much as can certainly be traced out, with regard to their legal original.

And in the laws of *Athelſton.*

II. *Of the ſeveral Kinds of Tithes, with their Natures and Properties; and herein of Agiſtment Tithes; of the Diſtinction between Great and Small Tithes, and of the Manner of ſetting them out.*

Tithes defined.

TITHES are a ſecond *ſpecies* of incorporeal hereditaments, and are defined to be the tenth part of the (1) increaſe, yearly ariſing and renewing from the profits of land, the ſtock upon lands, and the perſonal induſtry of the inhabitants; the firſt *ſpecies* being uſually called (2) *prædial*, as of corn and

Their different *ſpecies.* *Prædial.*

(1) See *Bateman* and *Aiſtrop* & others, *E.* 14 *Geo.* III. p. 693. and ſee p. 131. n.

(1) *Prædial* tithes are ſuch as ariſe merely and immediately from the ground, for a piece of land or ground being called in Latin *prædium* (whether it be arable, meadow or paſture) the fruit or produce thereof is called *prædial*, and conſequently the tithe payable for ſuch annual produce is called a *prædial* tithe. 3 *B.* E. L. 375. See *Hardwycke* and *Newte*, T. 7 *Car.* II. p. 21. *Hewitt* & others and *Adams*, *E.* 22 *Geo.* III. p. 994.

grain of all ſorts, graſs, hay, hops, fruits, mixed herbs, and wood; the ſecond *mixed* (1) as of wood, milk, pigs, colts, calves, lambs, chickens, milk, cheeſe and eggs conſiſting of natural products, but nurtured and preſerved in part by the care of man, and of thoſe the tenth muſt be paid in groſs; the third (2) *perſonal*, as of manual occupations, trades, fiſheries, and the like, and of theſe only the tenth part of the clear gains and profits is due, after all charges deducted (3). Mixed. Perſonal.

In general, tithes are to be paid of common (4) right for every thing that yields an annual increaſe by the act of God, as corn, hay, fruit, cattle, poultry, and the like; and of ſuch things (5) only. Things that renew yearly.

Yet this rule admits of ſome exceptions; as for inſtance, tithe is due of ſaffron, though gathered but once in (6) three years; and concerning *ſylva* (7) Except Saffron. *Sylva cædua.*

(1) *Mixed* tithes are thoſe which ariſe not immediately from the ground, but from things immediately nouriſhed by the ground, as by means of animals depaſtured thereupon, or otherwiſe nouriſhed with the fruits thereof. 3 *B.* E. L. 375.

(2) *Perſonal* tithes are ſuch profits as do ariſe by the honeſt labour and induſtry of man, employing himſelf in ſome perſonal work, artifice, or negotiation. 3 *B.* E. L. 375. See *Carleton* and *Brightwell*, *T.* 2 & 3 *Geo.* II. p. 250.

(3) 2 *Black.* Com. 24. but ſee *Kelynack* and *Gwavas*, *H.* 3 *Geo.* II. p. 287.

(4) *Watſ.* chap. 46.

(5) 3 *B.* E. L. 378.

(6) 3 B. E. L. 454. *Walton* and Lady *Mary Tryon*, *M.* 25 *Geo.* II. p. 457.

(7) Tithe is as much due of *ſylva cædua*, by the law of *England*, as any other tithe whatſoever. 3 *B.* E. L. 438. See Parſon of *Buttolph's* caſe, *M.* 4 *Car.* I. p. 15. *Walton* and Lady *Mary Tryon*, *M.* 25 *Geo.* II. p. 452, 454.

cædua, there is an entry in the regiſter, that (1) conſultations ſhall be granted thereof, notwithſtanding it is not renewed every (2) year.

Payable but once a year.

Generally of things increaſing yearly, tithes ſhall be paid only once in the year.

Except

Seeds.

Clover.

But neither is this rule univerſally true; and it is evidently againſt the canon law, which requires, that if ſeeds be ſown upon the ſame ground, and renew oftener than once in the year, the tithes thereof ſhall be paid ſo often as they renew; and this ſeemeth ſtill to be the (3) law, as in the caſe of clover for incloſures, which reneweth oftener than once in the year, tithes thereof ſhall be paid as often as it doth renew.

Subſtance of the earth.

Of common (4) right no tithes are to be paid of quarries of (5) ſtone or ſlate, for that they are parcel of the freehold, and the parſon has tithes of the graſs or corn, which grow upon the ſurface of the land, in

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(1) A conſultation is a writ, and ſo called, becauſe upon deliberation and conſultation had, the judges find the prohibition [which alſo is a writ and iſſues out of one of the ſuperior courts at *Weſtminſter*, directed to an inferior court, commanding them to ceaſe from proceeding, upon a ſuggeſtion, that either the cauſe originally, or ſome collateral matter ariſing therein, does not belong to that juriſdiction, but to the cognizance of ſome other court. 3 *Black.* Com. 112.] to be ill founded. and therefore, by this writ, they return the cauſe to its original juriſdiction, to be there determined in the inferior court. 3 *Black.* Com. 114.

(2) *Gibſ.* 669.

(3) See *Bateman* and *Aiſtrup* & others, *E.* 14 *Geo.* III. p. 693.

(4) 3 *B.* E L. 378. 2 *Black.* Com. 24.

(5) Lord Chief Juſtice *Holt* obſerved that the practice of the Spiritual court made ſtones, gravel, and all things titheable. Lord *Raym.* 137.

which

which the quarry is; ſo neither for coal, turf, flags, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and ſuch like, becauſe they are not the increaſe, but of the ſubſtance of the earth; and the like hath been reſolved of houſes (conſidered ſeparately from the ſoil) as having no annual increaſe; but by particular (1) cuſtom, tithes of any of theſe may be payable.

Feræ naturæ.

By the common (2) law of *England*, there is no tithe due for creatures that are of a wild nature, or *feræ* (3) *naturæ*; and therefore it hath been reſolved, that no tithe ſhall be paid for fiſh taken out of the ſea, or out of a river, unleſs by (4) cuſtom, as in *Wales*, *Ireland*, *Yarmouth*, and other places; neither, for the ſame reaſon, is any tithe due of deer, conies, (5) hawks, and the like, whoſe increaſe, ſo as to profit the owner, is not annual, but (6) caſual.

Fiſh.

Deer, conies, hawks.

If a parſon (7) leaſes his glebe lands, and does not alſo grant the tithes thereof, the tenant ſhall pay him the tithes; and if a parſon lets his rectory, reſerving the glebe lands, he ſhall pay the tithe thereof to his (8) leſſee.

Glebe lands.

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(1) Dr. *Bennet* and *Treppaſs* & others, *H.* 9 *Geo.* I. p. 182.

(2) *Dig.* p. 2. chap. VIII.

(3) 2 *Black.* Com. 24. 3 *B.* E. L. 378.

(4) *Gwavas* and *Kelynack*, *T.* 32 *Car.* II. p. 61.

(5) 2 *Black.* Com. 24.

(6) See *Baxter* and *Knollys*, under *T.* 24 & 25 *Geo.* II. p. 451.

(7) *Sav.* 3. p'. 8.

(8) *Gibſ.* 661.

Severance.

If a parſon ſow his glebe, and dieth before ſeverance, and afterwards his ſucceſſor is inducted, and his executor or vendee ſevereth the corn, the ſucceſſor ſhall have the tithe thereof; for although the executor repreſent the perſon of the teſtator, yet he cannot repreſent him as parſon, inaſmuch as (1) another is inducted.

Deprivation.

Reſignation.

Otherwiſe if (2) the parſon dieth after ſeverance from the ground, the ſame is true in caſe of (3) deprivation or reſignation after glebe ſown, the ſucceſſor ſhall have the tithe, if the corn was not ſevered at the time of his coming in, otherwiſe if (4) ſevered.

Meres or balks.

Headlands.

Stubble.

Notwithſtanding it is laid down in all (5) the old books, that tithes are not to be paid for the herbage of meres or balks in corn fields (6); nor for hay which groweth upon headlands, where the horſes and plough turn, when the land is (7) ploughed; nor for ſtubble of corn (if the corn has paid tithe) which groweth the ſame year upon that land, though ſuch ſtubble be cut for thatch or other (8) uſes; and that in ſuch caſe, no tithes ſhould be paid for the after

(1) 3 *B.* E. L. 381.

(2) *Gibſ.* 661.

(3) See the caſe of *Daſhfield* and *Carnesio*, under T. 15 *Car.* II. p. 37.

(4) See *De modo decimandi, poſt.*

(5) 3 *B.* E. L. 422.

(6) 2 Inſt. 652.

(7) 1 *Rol.* Abr. 646.

(8) 2 Inſt. 652. 1 *Rol.* Abr. 640.

paſture

pasture of that land for that same (1) year, nor for the agistment in such after pasture. After-pasture.

Nevertheless (2) the modern determinations in equity are directly contrary; for that the balks and meres, the headlands, stubble, and after (3) eatage, are as much a part of the increase of that same year, as the corn or hay. Modern determinations *contra*.

It hath been (4) disputed, whether the tithes of beans and pease, gathered by the hand, and sold for man's food, is a Great or Small (5) tithe. Beans and pease.

Rape seed is a small tithe; it hath not been sown many years in large quantities in this country; and Doctor (6) *Burn* does not find or know of any judicial determination concerning this particular species of tithe; the method of cultivation of rape seed is this; Rape seed small tithe.

It is sown in *August* or *September*, and suffered to grow till the seed is quite ripe, and then it is cut down with the greatest care, and if possible in calm Method of cultivation.

(1) 1 *Rol.* Abr. 641.

(2) 3 *B.* E. L. 422, 429, *R. Reym.* 242.

(3) *Bateman* and *Aistrop* and others, E. 14 *Geo.* III. p. 692.

(4) 5 *B.* E. L. 423.

(5) *Sims* and *Barnett, M.* 1 *Geo.* III. 488. *&c. &c.* and *post*, under our distinction between Great and Small tithes.

(6) 3 *B.* E. L. 431.

weather

weather with ſickles, leaſt any of the ſeed ſhould drop from the pods, and be loſt upon the ground; and for the ſame reaſon it is never bound up in ſheaves, or made into hattocks; but, as ſoon as may be, it is gathered upon a large cloth, brought into the field for the purpoſe, and upon ſuch cloth is threſhed and dropped, and then the ſeed is removed out of the field in ſacks or bags; the ripeneſs of the ſeed when proper for cutting, and the ſmallneſs of it, renders this method of cultivation abſolutely neceſſary; for if it was to be bound up in ſheaves, or gathered into heaps, and then removed in carriages or otherwiſe, out of the field, to be threſhed and dreſſed, a great part of the ſeed would be ſhaken and loſt, which would not only be a damage to the owner, but alſo to the land, for the ſhaken ſeed would grow again, and ſpoil the future crop of grain.

Compoſition for it.

It is uſual for the occupier of the land to agree with the owner of the tithe of rape ſeed, at ſo much an acre.

Though no determination;

How tithe thereof to be ſet out, by the better opinion.

It never has been determined, in what manner the tithe of rape-ſeed ſhall be ſet by the occupier of the land, where he does not agree to pay a compoſition for it; but the better opinion ſeems to be, that it ſhould be ſet out by meaſure in the field, after it is threſhed and dreſſed; from it's manner of cultivation, the owner of the tithe cannot ſooner remove it from the land, and as he has no right to enter upon the land for any other purpoſe, than to take away his tithe, which in this caſe is not capable of being taken away, before it is threſhed and dreſſed.

Agiſtment

Agiſtment (1) is the keeping or depaſturing of ſheep, and of any kind of cattle, whether beaſts or horſes; and the tithe of agiſtment is the tenth part of the value of the keeping or depaſturing ſuch ſheep, beaſts, or horſes, as are liable to pay it; and it is ſo called from the *French geyſer, giſter* [*jacere*] to lie; becauſe the beaſts are (2) *couchant* and *levant*, that is, lying and riſing. Agiſtment or paſturage defined.

Tithes of agiſtment of ſheep depaſtured on turnips, remaining on the ground unſevered were (3) decreed, becauſe (4) in ſuch caſe, the ſheep being turned off to be fatted, ceaſe to be profitable to the parſon in any other way. For what cattle.

Tithes (5) for depaſturing unprofitable cattle, is not due for the cattle, but for the produce of the ground, on which the cattle are (6) depaſtured.

This tithe hath this peculiar difficulty attending it, that it cannot be taken in kind; for as it is no otherwiſe cut or ſevered than by the mouth of the animal, together with the other nine parts, and conſumed at the ſame time, the perſon to whom it is due, can only receive the value of it. In what manner to be paid.

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(1) 3 *B.* E. L. 432. Dr. *Willis* and *Harvey, M.* 9 *Geo.* III. 573. *Bateman* and *Aiſtrup* and others, *E.* 14 *Geo.* III. 659.

(2) The compiler has preſumed to tranſpoſe the words *levant* and *couchant*" in the text, otherwiſe "lying and riſing" is not a tranſlation of them.

(3) *Coleman* and *Barker, E.* 12 *Geo.* I. p. 222. *Swinſen* and *Digby, H.* 5 *Geo.* II. p. 334.

(4) 3 *B.* E. L. 434.

(5) *Underwood* and *Gibbon, H.* 2 *Geo.* I. p. 132.

(6) 3 *B.* E. L. 435.

But

But this way of eſtimation according to the value is only for (1) convenience; for the tenth part of the produce, and not a ſum of money, is undoubtedly due *de jure*.

And this way (2) of valuation, according to the pound rent of the land, cannot be any certain rule, eſpecially where profitable, and unprofitable cattle are depaſtured together; it being impoſſible, in ſuch caſe, to adjuſt or aſcertain, how much of that rate of two ſhillings in the pound, the unprofitable cattle ſhall pay; but in all caſes, the tithe of agiſtment of barren and unprofitable cattle is to be paid according to the value of the keeping of each *per* week; and the value of the keeping of a ſheep, beaſt, or horſe, upon any particular lands, is as eaſily aſcertained, from the uſual prices given for the depaſturing ſuch ſheep, beaſts, and horſes, *per* week each, in that pariſh or neighbourhood, whether profitable cattle are kept at the ſame time, upon the the ſame lands, together with them (3) or not.

Whether wood is a Great or Small tithe.

It hath been (4) ſaid. that if a vicar be only endowed with the Small tithes, and has by reaſon thereof always had tithe wood, in ſuch caſe (5) wood

(1) An argument of convenience cannot, in any reſpect, alter the nature of tithe. 3 *B.* E. L. 448. nor any other right. *Cullimore* & another, and Dr. *Boſworth*, *H.* 19 *Geo.* III. p. 940. *Hewitt* & others and *Adams*. *E.* 22 *Geo.* III. p. 1002

(2) 3 *B.* E. L. 435, 436.

(3) *Smith* and *Roocliff*, *H.* 4 *Geo.* I. p. 140. *Harriſon* and *Sharp* & another. *T.* 11 *Geo.* I. p. 211. *Bateman* and *Aiſtrup* & others, *E.* 14 *Geo.* III. p. 692.

(4) *Deg.* p. 2. c. 2.

(5) See our diſtinction between Great and Small tithes, *poſt*, p.

ſhall

ſhall be accounted a Small tithe, otherwiſe it is to be accounted amongſt the Great tithes; but Doctor (1) *Burn* obſerves, that this does not alter the quality of the tithe; and the vicar's having received it, may be evidence of a grant thereof having been made ſubſequent to the endowment, although ſuch original grant is now loſt; but it is not evidence that wood in it ſelf is ſmall tithe. Evidence.

The ſcarcity of other timber (as hath been ſaid) and the cuſtom of the country to put hazel, birch, willow, white thorn, holly, alder, maple, aſp, hornbeam, and ſuch other like trees of baſe and inferior nature, and unfit for buildings, to the uſes of good timber, may free them, being of twenty years growth, or under, from payment of tithes, as hath particularly been adjudged of aſp, cherry tree, and other like trees in *Buckinghamſhire*; ſo of willows in the county of *Southampton*. Whether tithe payable only of wood not fit for timber.

Every (2) perſon who ſhall ſow any hemp or flax, ſhall pay to the parſon, vicar, or impropriator, yearly, the ſum of five ſhillings, and no more, for each acre of hemp and flax ſo ſown, before the ſame be carried off the ground, and ſo proportionably for more or leſs ground ſo ſown, for the recovery of which money, the parſon, *&c.* ſhall have the uſual remedy by law. Hemp and flax to pay five ſhillings an acre, tithe yearly.

Act not (3) to charge any lands diſcharged by *modus decimandi*, ancient compoſition, or otherwiſe diſcharged of tithes by law. Not to charge lands diſcharged.

(1) 3 *B. E. L.* 438.

(2) Stat. 11 & 12 *Wil.* III. chap 16. ſect. 1.

(3) *Id.* ſect. 2.

Flax

Flax Small tithe.

Flax hath been adjudged to be Small (1) tithe, notwithſtanding (2) it's being ſown in large (3) fields.

Madder to pay ſame tithe as hemp, &c.

The like (4) ſum to be paid parſon, &c. in lieu of all manner of tithe of madder, before carried off, as of hemp and flax, with the like proviſions for recovery, and as to lands diſcharged.

Madder Small tithe.

By the ſame rule that the tithe which proceeds from things newly (6) introduced into *England*, hath been adjudged to be a Small tithe, the tithe of madder (7) may be deemed alſo a Small tithe.

Wood.

If (8) there be no cuſtom reſpecting the manner tithe of wood is to be paid, then the general rule ſeems to be, ſo ſoon as the tenth can be ſevered from the nine parts.

Sale thereof.

As to the vendor and vendee of wood paying tithe on the ſale; Doctor (8) *Burn*, ſays, in ſhort, the matter ſeemeth to be plainly this; that he ſhall pay tithe, to whom the other nine parts belong, when the tithe become due.

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(1) *Wallis* and *Pain*, *H.* 12 *Geo.* II. p. 359.

(2) *Gibſ.* 670.

(3) *Quære*, and ſee our diſtinction between Great and Small tithes, *poſt*, p.

(4) Stat. 31 *Geo.* II. chap. 12. ſect. 23. which is only a temporary law, and expires in 1786. See ſtat. 5 *Geo.* III. chap. 18.

(5) See our diſtinction between Great and Small tithes, *poſt*, p.

(6) 3 *B.* E. L. 449.

(7) 3 *B.* E. L. 448.

Potatoes

Potatoes (1) are a ſmall tithe, and conſequently due to the vicar, where he is endowed of the ſmall tithes; and, when gathered, the tenth part muſt be ſet out. Potatoes.

So alſo turnips, when pulled, ought to pay tithe, though never ſo often ſowed, and though upon the ſame (2) land. Turnips.

Tithes (3) ſhall be paid of turnips ſown on land after corn cleared, and fed with ſheep and barren cattle; that is to ſay, if the cattle are fed upon the turnips unſevered from the ground, an agiſtment tithe ſhall be paid for ſuch cattle; but if the turnips are ſevered from the ground, then the tithe in kind of ſuch turnips ſhall be due from the (4) ſeverance.

Moſt commonly a certain conſideration in money is paid for (5) gardens, either by cuſtom or by agreement with the parſon; if the cuſtom be a parochial cuſtom, or extending to gardens throughout the pariſh; the enlargement of a garden doth not make tithe due *in ſpecie*, but otherwiſe, if it is a ſpecial preſcription for this or that garden; and the ſame thing is to be ſaid of (5) orchards. Gardens. Orchards.

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(1) 3 *B.* E. L. 453.

(2) *Benſon* and *Watkins* & others, *H.* 3 *Geo.* I. p. 135. 1092. *Crow* and *Stoddart*, *M.* 6 *Geo.* I. p. 1095. *Harwood* and *Railſton*, *T.* 9 *Geo.* I. p. 1099.

(3) *Swinſen* and *Digby*, *H.* Term, 5 *Geo.* II. p. 334.

(4) 3 *B.* E. L. 454.

(5) *Perrot* and *Markwick*, *T.* 3 *Geo.* I. p. 134.

The

Acorns.

The caſe of (1) acorns ſeemeth not different from the tithes of other things titheable; if gathered, they ſhall pay tithe in kind; and the tenth penny, or two ſhillings in the pound, in all ſuch like caſes, is not to be conſidered as excluſive of the tithe to be paid in kind, but only as a reaſonable ſatisfaction when the pariſhioner diſpoſeth of his whole produce unſevered; and when the acorns are not gathered by the owner, but ſuffered to be fed upon, as they drop; the caſe ſeemeth to fall under the ſame equity, as where turnips are fed upon by unprofitable cattle, for which an agiſtment tithe ſhall be paid.

Agiſtment tithe to be paid for turnips fed upon by unprofitable cattle.

Calves.

In moſt places (2) as it ſeemeth, at this day, the cuſtom hath obtained (which is the proper rule in all ſuch caſes, and is equitable in itſelf) that if there are five calves, the parſon ſhall have the value of half a calf, lamb, or ſuch like: if there are ſix, he ſhall have one entire, and ſhall receive or pay out reſpectively a proportionable ſum, for every number under five or above (3) ſix.

One (4) preciſe determinate day, for the time of payment of the tithe of calves, colts, kids, pigs, and ſuch like young of cattle, cannot be equally applicable to all places and ſeaſons; this muſt depend, in ſome meaſure, upon the ſituation of the country, the time of putting their ewes to the ram, and the forwardneſs or backwardneſs of the ſeaſon in general; what cometh neareſt to the matter,

(1) 3 *B.* E. L. 455.

(2) 3 *B.* E. L. 456.

(3) *Egerton* and *Still*, T. 11 *Geo.* I. p. 220.

(4) 3 *B.* E. L. 457.

where

where there is no ſpecial cuſtom concerning the ſame, ſeemeth to be what was declared by the court in the caſe of *Upper* (1) *Clatford*, namely, that the propereſt time for the parſon to take the tithe is, when the owner weaneth the reſt; for it is not ſuppoſable, that the owner will wean his lambs ſooner, or keep them with the ewes longer, than they are fit to be weaned; the former being a prejudice to the lambs, and the latter to the ewe.

And as the (2) parſon is to have the tithes of the young and increaſe of the cattle, ſo he on his part is to obſerve the (3) cuſtom of the place, for the better propagation of their increaſe.

Tithe (4) of hogwool, that is, the wool of ſheep of a year old, is payable, the ſame being (5) clearly a new increaſe. In what manner wool and lamb to be tithed.

It (6) is now clearly held, that the tithe, both of lamb and wool, ſhall be paid where the ſheep or lambs are ſhorn. How to be proportioned in different pariſhes.

Indeed, if the ſheep be carried away unneceſſarily, and but a little before ſhearing or lambing time, Sheep removed to avoid payment of tithe lamb.

(1) See *Croft's* caſe, under *M.* 8 *Geo.* I. p. 160, 161.

(2) 3 *B.* E. L. 457.

(3) Defendant decreed to keep a bull, purſuant to the cuſtom, on a bill to compel the rector to keep a bull, which, by cuſtom, he ought to do for the uſe of the pariſhioners, and ſo was admitted by the defendant himſelf. *Bunb.* 171, 173.

(4) *Chriſtian* and *Wrenn* & others, *M.* 6 *Geo.* II. p. 336, 337.

(5) 3 *B.* E. L. 459.

(6) 3 *B.* E. L. 461.

this is (1) fraudulent; and the tithes ſhall be paid, in ſuch caſe, in the pariſh, from whence they were fraudulently removed.

But if they ſhall be removed without fraud, it is held in equity, that no part of the tithe of the wool or lamb will be payable in the pariſh from whence they were removed, but an agiſtment tithe muſt be paid for them, as for cattle yielding no profit to the incumbent there; and that theſe tithes are in no caſe to be divided, but the whole to be paid, where they lamb, or are ſhorn; and an agiſtment tithe for them as unprofitable cattle, in every other pariſh, where they have been depaſtured.

Agiſtment tithe of ſheep.

And no regard is had to the diſtinction, whether they have continued for leſs than a month; for there is the ſame equity, that tithes ſhall be paid for one day as for thirty.

Nor is the objection of any force, that in ſuch caſe the ſheep pays two tithes in one year; for that is not the fact; the tithe of wool is one thing, the tithe of agiſtment is quite another, being only tithe of the herbage, which, if ſuffered to grow to maturity, would have yielded tithe of hay, or if the land had been ſown with corn, a corn tithe muſt have been paid.

Where (2) a *modus* is paid for a tithe lamb, and the other nine lambs are ſhorn, tithes ſhall be paid of the wool thereof; for wool and lamb are different *ſpecies* of tithes, and therefore a *modus* for lambs is no ſatisfaction for the tithe of wool.

Lambs wool.

(1) *Boys* and *Elkis*, *M.* 10 *Geo.* I. p. 197.

(2) 3 *B. E. L.* 463.

The

The *tithe* in kind of wool ſhall be paid only in the pariſh where ſheep are ſhorn; and an agiſtment tithe in the other pariſhes, where they have been depaſtured; otherwiſe, it might be very inconvenient to proportion and divide the wool, eſpecially where the pariſhes ſhall be (as it may happen) at a very great diſtance. Sheep agiſted.

Deer being *feræ* (1) *naturæ*, are not titheable without ſpecial cuſtom. But if tithe thereof be due by cuſtom, it muſt be paid. Deer.

Tithes in kind, or a *modus* for rabbits, may be by cuſtom. Rabbits.

There (2) is a conſultation provided in the regiſter, for the tithes of honey, and of the wax of bees. Bees, honey, wax.

It doth not (3) ſeem to be agreed, whether, or how far fiſh in *ponds* or private fiſheries are liable to pay tithe; and therefore the ſame muſt be referred to the cuſtom of particular places. Fiſheries.

Tithes (4) with regard to value, are divided into great and ſmall; when (5) this diſtinction was at firſt ſettled, which is as (6) long as appropriations Diſtinction between great and ſmall tithes.

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(1) 3 *B.* E. L. 482.

(2) 3 *B.* E. L. 472.

(3) 3 *B.* E. L. 473.

(4) 3 *B.* E. L. 375, 376.

(5) By Lord Chancellor *Hardwicke*, *Smith* and *Wyatt*, *T.* 15 *Geo.* II. P. 395.

(6) By Lord Chief Baron *Comyn*, *Wallis* & another and *Underhill*, *H.* 2 *Geo.* II. p. 357

Foundation of it. to religious (1) houſes; probably it was upon this foundation, that the former yielded tithes, which were called ſmall, produced but in ſmall quantities; though it might be arbitrary at firſt, yet it hath grown into a rule, and fixed ſo, for the ſake of certainty.

Diviſion of them. Under the firſt diviſion are comprehended corn, hay, and wood; and under the ſecond, the predial tithes of other kinds, together with thoſe which are called mixed and (2) perſonal.

How may be altered. But it is ſaid, that this diviſion may be altered.

By cuſtom. 1. *By Cuſtom.*

This will make wood (6) ſmall tithes under the general words *minutæ decimæ*, in the endowment of the vicar.

By quantity. 2. *By Quantity.*

This will turn a ſmall tithe into great, if the pariſh is generally ſown with it.

By charge of place. 3. *By change of Place.*

Tithes great or ſmall from their nature, not quantity, *ſed quære.* "It is true (ſays Lord Chief Baron (3) *Comyns*,) ſome opinions have been, that ſmall tithes muſt be eſtimated, not from the nature of the thing titheable, but from the quantities of the tithes; and therefore it was ſaid in *Uvedal* (4) and *Tindal*'s caſe,

(1) Theſe houſes uſually engroſſed the great, and left the ſmall tithes for the curate. By Lord Chief Baron *Comyn*. S. C. S. T. p. 357.

(2) *Gibſ.* 663.

(3) *Wallis* & another, and *Pain*, H. 12 *Geo.* II. p. 359, 360.

(4) *Cr. Car.* 78. *Hut.* 77.

if

if all the profits of a parish consist in such things, hemp, hops, wool, lambs, &c. may be great tithes, so in (1) *Cod. Jur. Eccles.* it is said, hops in gardens are small, in the fields great tithes; and in the case of *Wharton* and (2) *Lisle*, *Holt* Chief Justice at first seemed of opinion, that tithes must take the denomination of small or great from the quantity of the crop growing; but the three (3) other judges held strongly, that tithes were great or small, from the nature of the things, which yielded the tithes; and *Holt* acquiesced to it so far, that he absented himself, when judgment was given, which he would scarcely have done, if he had been fixed in the contrary opinion."

Wharton and *Lisle*. *Holt* ch. j.

"And this seems the better opinion, for it gives foundation for continual debate, what shall be a quantity too large for small tithes; if it be said what grows in a garden, some gardens are not half an acre, others two or three acres; gardens are enlarged now adays to fifty or one hundred."

C. Baron *Comyns* reasons.

"And as to things newly introduced into *England*, there is but little reason, that the patentees, who claim only what came to the crown upon the dissolution of monasteries, should have tithe of those things, which were never appropriated, and to which the religious houses dissolved, never had title."

(1) *Gibs.* 691.

(2) 4 *Mod.* 183. 3 *Lev.* 365. 12 *Mod.* 41. *Carth.* 263. *Skin.* 341. 356. *Comb.* 201. 209.

(3) *Dolben*, *Eyre*, and *Gregory*.

able; but he has been (1) taught, that no authority, however weighty, ſhould put a ſtop to the ſpirit of inquiry; and as he believes that a cloſer examination of the point in queſtion, may furniſh a few obſervations tending to a contrary opinion, he preſumes to ſubmit them to the better judgment of his readers.

Tithes belong to the rector.

Vicar can claim only by endowment or preſcription.

Uſage and payment.

Evidence of endowment and of preſcription.

All tithes, of common right, at common law, or by cuſtom (for theſe are ſynonimous terms) belong to the rector, therefore the vicar can claim tithes only by endowment (2) or preſcription; but as moſt endowments are ancient, and therefore few of them can be produced, if the vicar proves a conſtant uſage, and payment of all ſmall tithes, the courts (3) admit them evidence of an endowment, and the ſame evidence proves a (4) preſcription.

Tithe of hops ſometimes taken by impropriator, ſometimes by vicar.

The tithes of hops, in different pariſhes, are ſometimes taken by the (5) impropriator, ſometimes by the vicar, as by many (6) ſuits in the court of *Exchequer*, reported in the enſuing ſheets will appear;

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(1) See "Catalogue of the Works of Sir *William Blackſtone*," p. 58. ſubjoined to the Biographical Hiſtory of that celebrated Lawyer, octavo edit. 1782.

(2) *Sims* and *Bennett*, *M.* 3 Geo. III. p. 513.

(3) 3 *B.* E. L. 438. *Fox*, *&c.* and *Barkley* & others, *M.* 8 *Geo.* II. p. 316. Corporation of *Bury* and another, and *Evans*, *E.* 12 *Geo.* II. p. 372. *Kellington* vicar, and *Trinity* college. *T.* 21 & 22 *Geo.* II. p. 424.

(4) Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo.* II. p. 383.

(5) Sir *Henry Spelman* ſays, that *impropriations* are ſo called, becauſe they are *improperly* in the hands of laymen. 1 *Black.* Com. 386. n.

(6) *Chitty* and *Reeves*, *T.* 3 *Jac.* II. p. 67. *Perch* and *Gee*, *H.* 9 *Wil.* III. p. 87. *Gee* and *Perch*, *E.* 2 *An.* p. 97. *Wakon* and *Tyers*, *M.* 25 *Geo.* II. p. 465. *Tyers* and *Walton*, *E.* 26 *Geo.* II. p. 467. 1137.

particularly by the following decree in the cauſe of *Bliſs* and *Chandler*, in favour of the plaintiff, who was the impropriate rector of *Maidſtone* in *Kent*, where there is a great plantation of hops.

Bliſs and *Chandler.*

Upon a bill for tithes of hops the caſe appeared to be this: plaintiff having given notice to the defendant, that he would take his tithes in kind, the firſt three days, defendant paid plaintiff every tenth buſhel when picked, but afterwards he left every tenth pole ſevered from the ground, and ſaid, the reaſon of paying them by the buſhel at firſt, was becauſe, but here and there a pole of thoſe that were ripeſt; plaintiff objected, that this was not an equal and fair way of tithing, becauſe there was a great difference in the value of the poles, and that this was not a legal ſeparation; and two caſes were cited, where this manner of tithing had been adjudged to be ill (1) *Gee* v. *Perch*, 10 *Wil.* 17 *Nov. Gee.* (2)—— *M.* 3 *An. Chitty* (3) v *Reeve*, *Trin.* 1687. ——— defendant inſiſted, that he ought not to be at the charge of picking, and the plaintiff being intitled to the tithes, both of the hops and the bines, he ought to take them together.

Gee and *Perch.* *Gee* and ——. *Chitty* and *Reeve.*

The court unanimouſly (4) decreed, that the method of tithing hops, ought to be by the buſhel or meaſure, not the pole. (5) *Bliſs* v. *Chandler*,

Hops to be tithed by the meaſure, not pole.

(1) Reported in theſe ſheets by the name of *Perch* and *Gee*, under *H.* 8 *Wil.* III. p. 97.

(2) Reported by the name of *Gee* and *Perch*, under *E.* 2 *An.* p. 97.

(3) Reported by the name of *Chitty* and *Reeves*, under *T.* 3 *Jac.* II. p. 67.

(4) This decree was pronounced in the year 1720.

(5) See this caſe alſo reported by us, under *M.* 7 *Geo.* I. p. 152.

It

Vicar not intitled to tithes of hops by preſcription, and why.

It ſeems incumbent upon a vicar to ſhew his (1) endowment extends to this ſort of tithe; for it is certain he could not intitle himſelf to the tithe of hops by (2) preſcription, becauſe hops were not brought into *England*, before the reign of Queen (3) *Elizabeth*.

Whether hops great or ſmall tithes, a queſtion much litigated.

Whether hops be *minutæ vel majores decimæ*, may be ſaid to be *vexata queſtio*; for the judges have differed extremely in their opinions.

Judges have differed in their opinions.

Their opinions examined.

In the above-mentioned caſe of (4) *Wharton* and *Liſle*, Lord Chief Juſtice *Holt* held hops to be *majores decimæ* (or great tithes) if planted in fields, and though in that caſe the other judges held that flax was in its own nature ſmall tithes, yet if the greateſt part of the pariſh was ſown with it, they ſaid they might (4) alter their opinions.

Uvedal and *Tindal*. *Portman*'s caſe.

In the caſe of *Uvedal* and *Tindal*, (5) *Portman*'s caſe was vouched, where it was adjudged that hops in *Kent* were great tithes.

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(1) Vicar being endowed of ſmall tithes is thereby intitled to the tithes of hops, though of growth ſince endowment. *Franklyn* and *Saint Croſs*, T. 8 *Geo.* II. p. 158.

(2) Preſcription to pay ſo much in lieu of all ſmall tithes, may include hops and other ſuch ſmall things which have come in uſe of late years. *Bunb.* 20. n.

(3) Hops exiſted before the time of Queen *Elizabeth*, in ſmall quantities, *Chapman* and *Smith*, T. 27 & 28 *Geo.* II. p. 471, 481. The court will take notice that hops have not been ancient, *Perch* and *Gee*, H. 9 *Wil.* III. p. 87. but uſed in beer of late times only, being firſt introduced into *England* about the year 1524. 3 *B.* E. L. 453. *Quære*, if hops were introduced 15 *Hen.* VIII. which correſponds to about the year 1524. they may not be conſidered as of *ancient* introduction.

(4) *Comb.* 209.

(5) *Hut.* 78.

In (1) *Crouch* and *Risdon*, hops are said to be small tithe, but that was not the question before the court. *Crouch* and *Risdon*.

Mr. Dean (2) *Watson*, in his Compleat Incumbent, though no favourer of the impropriator, acknowledges, that it is said, that if all the profit of a parish should consist of things which in their own nature are minute tithes, they thereby would become great tithes; for which reason hops in *Kent*, he says, were adjudged great tithes; and this is agreeable to (3) *Portman*'s case, but then he adds a question, if hemp, flax, &c. are not in their nature to be accounted small tithes; for what we call small tithes, says he, seems to me to be in respect to the thing it self, and not from the quantity of land sowed therewith, whereby the tithes thereof are of but small or little value; though he takes notice immediately after, that the Lord Chief Justice *Holt* held, that flax sowed in a common field was great tithe. Dean *Watson*.

The name of a vicar was not known till the (4) reign of *Hen.* III. till which time rectors found curates, and maintained them by certain stipends; but after the constitution of Pope *Urban* the *Eighth*, rectors, instead of the former maintenance, assigned to their curates, who then began to be called vicars, a certain portion of the tithes; and because it could not be supposed, that the rector would assign the great or valuable part of his rectory; the portion assigned was called small tithes; and thus the endowment of vicarage began, and as the endowment is now the sole (4) ground of a vicar's title to tithes, Name of vicar when first known. Endowment vicar's sole ground for tithes.

(1) 1 *Sid.* 443. pl. 17. (2) P. 402.

(3) *Hut.* 78. (4) 4 *Mod.* 184.

the

How the queſtion therefore, whether tithes great or ſmall ought to be determined *as it ſeemeth.*

the queſtion what is, or what is not to be eſteemed great or ſmall tithes, is to be determined by the nature and reaſon of the endowments, and not by conſidering whether the thing to be tithed has one leaf or two, a long ſtalk or a ſhort one, or whether it be called herb, graſs, or grain. Thoſe who have grounded their opinions upon the latter diſtinctions, ſeem to have been judges who knew not ſo well how to diſtinguiſh words from things, as my Lord Chief Juſtice (1) *Holt*; for he always regarded the principal or original intention of endowments, and from thence derived the reaſon of his judgment, and not from the ſhape of the land, or the colour of what it produced; he knew it was originally intended by the grant, that the vicar was to have only ſmall tithe, that is a ſmall portion of the tithe for his officiating, and not the tithe of what occupied the principal part of the pariſh, whereby the benefit of the rectory would be transferred to the vicar, or whereby the income of the rector might be leſs than that of his curate, and therefore pronounced his judgment to be, that when hemp, flax, hops, *&c.* were planted in large fields, they were to be eſteemed great tithes, though in orchards or gardens they might be taken for ſmall tithes. This is a judgment founded on the only ground reconcile-

(1) Lord Chief Juſtice *Holt* applied himſelf with great aſſiduity to the functions of his important office; he was a perfect maſter of the common law; and there was a remarkable clearneſs and perſpicuity of ideas in his Lordſhip's definitions, a diſtinct arrangement of them in the analyſis of his arguments, and the real and natural difference of things was made moſt perceptible and obvious, when he diſtinguiſhed between matters which bore an untrue reſemblance to each other; having thus rightly formed his premiſes, he ſcarce ever erred in his concluſions. See the Prefaces to the Reports of *Holt*'s Deciſions, which begin at the Revolution, and end about the year 1709.

able

able to any ſenſible idea; for the ſaying this or that is ſmall tithe in its own nature, is incapable of a meaning.

It is certain, therefore, that the proportion and value, and not the corporeal nature or external form of the thing ſowed, determines it to be ſmall or great tithes.

If a thing could be a ſmall tithe in its nature, when its nature was once determined, it would never after be great tithe; for it ſeems abſurd to ſuppoſe, that the ſame thing can have two natures.

Tithes for ſame thing, ſometimes paid to rector ſometimes to vicar.

But the conſtant practice of paying tithes for the ſame thing, ſometimes to the rector, and ſometimes to the vicar, ſeems a ſufficient refutation of ſuch a doctrine; this practice we take leave to inſtance, as to the tithe of peaſe, and beans, and of hay; and as to the former, Lord Chief Baron (1) *Comyn*, delivers himſelf thus:

Lord Chief Baron *Comyn* of opinion that beans and peaſe in gardens are ſmall, in fields great tithes, may be a proper diſtinction.

"Perhaps that beans and peaſe in gardens are ſmall, in the field are great tithes, may be a proper diſtinction, as to them, or other pulſe; becauſe they had exiſtence in former times, and appropriations were made *de bladis et leguminibus* to religious houſes."

Determination correſponding with ſuch opinion.

And it has been (2) determined, that tithes of beans and peaſe are never paid to the vicar, but al-

(1) See the caſe of *Wallis* & another, and *Pain*, 12 *Geo.* II. p. 358.

(2) *Stephens* and *Martin*, *H.* 8 *W.* III. p. 82.

ways

Stephens and *Martin.*

ways to the impropriator, without an (1) endowment or uſage to the contrary; and this decree was affirmed upon an appeal to the Houſe of Lords. Again,

Nicholas and *Elliot.*

Tithes of peaſe and beans decreed the (2) vicar, to be paid him by the impropriator, though it was contended, that the vicar was only entitled to the tithe of peaſe and beans ſet and planted in rows and ranks, and which had been hoed and weeded by the hand, upon ground turned up with the ſpade, as well in open fields as in gardens; but not where they had been ſo ſet, hoed and weeded, upon ground turned up only with the plough. Again,

Nicholas and *Aſton.*

Vicar (3) being endowed of the ſmall tithes, had for a long time received a compoſition of three ſhillings and four-pence an acre, in lieu of the tithes of ſuch beans and peaſe, ſet, planted, hoed, and weeded as aforeſaid, upon ground turned up with the ſpade, although in the open field; but when ſuch beans and peaſe had been ſo ſet, hoed and weeded, upon ground turned up only with the plough, and the tithes of them had been gathered in kind, by the impropriator, the uſe of the ſpade being omitted, upon contriving a tin or iron plate to the plough, will not make the ſaid beans and peaſe great tithes.

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(1) *Gumley* and *Burt*, T. 11 *Geo.* I. p. 206. In this laſt caſe, the counſel for the defendant obſerved, that it did not appear that the impropriator conteſted the matter, or what the endowment was.

(2) *Nicholas* and *Elliot*, H. 10 *Ann.* p. 119, 120. Counſel for the defendant in the caſe of *Gumley* and *Burt*, obſerved, that there was a proof of uſage by the vicar for fifty or ſixty years, receiving tithe peaſe and beans, where plough and ſpade were uſed: but where the plough only was uſed, the impropriator received them. T. 11 *Geo.* I. p. 206.

(3) *Nicholas* and *Aſton*, and others, T. 2 *Geo.* I. 130. 1095.

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The court of *Exchequer*, upon a rehearing of this cauſe, affirmed their former decree, which they admitted to be read, though not between the ſame parties, and rejected the evidence, verdict and judgment, in an action of trover brought by *Elliot* (1), a farmer of the great tithes, againſt *Nicholas* the plaintiff, for taking tithes of peaſe, which were ſet in rows and ranks, and weeded and hoed upon ground turned up with the plough; the queſtion at the trial of which action being, "*Whether the tithes belonged to the impropriator or vicar?*" the plaintiff in the action obtained a verdict; and the ſaid court of *Exchequer* ordered the impropriators, and their tenants, to account with the vicar for the ſaid ſmall tithes, becauſe (2) they were matters renovant, and ſubject to increaſe; this decree was alſo affirmed (3) upon appeal to the Houſe of Lords, though it was objected, that if the rule was to hold, that ſuch beans and peaſe ſhould be conſidered ſmall tithes, all the tithes of wheat, barley, *&c.* might be turned into ſmall tithes; but the anſwer given to this objection, appears from the reaſons upon which it is preſumed the Houſe of Lords affirmed the decree of the court of *Exchequer*, *viz.* that (4) without a preſcription, no claim could be made of ſuch tithes by a vicar, let the ground be prepared or turned, or the ſeed ſown or ſet in what manner ſoever; that when

A former decree of court of *Exchequer* affirmed upon a rehearing, and ſame admitted to be read, and rejected evidence, verdict and judgment at law.

Reaſons why beans and peaſe are deemed ſmall tithes.

An objection anſwered.

(1) P. 119.

(2) P. 131. n. *Bateman* and *Aiſtrup*, *E.* 14 *Geo.* III. p. 693.

(3) *Auſten* & others, and *Nicholas*, *H.* 4 *Geo.* I. p. 138. *Gumley* and *Burt*, *T.* 11 *Geo.* I. p. 206.

(4) *Id.* p. 136.

the

the vicar did ſo preſcribe, the diſuſing a ſingle inſtrument, and ſtill continuing the ſame crops and manner of huſbandry, could not deprive him of that preſcription; beſides, the vicar claimed tithes of no other corn or grain, ſet in rows or ranks, or otherwiſe ſown in fields, but only of peaſe and beans. Again,

Gumley and *Burt.* . Leſſee of (1) impropriator decreed the tithes of peaſe and beans, ſet and ſowed in rows, drilled, hoed, and hand-weeded in a garden-like manner, againſt the leſſee of the vicar, there being neither endowment produced, nor uſage proved, as a great tithe, the principal (2) part of the pariſh being converted into that method of cultivation (3), which took its riſe from garden culture of ſuch crops.

Hay taken both as great and ſmall tithes.

And as to hay: Hay in many pariſhes, where there is much corn, and little graſs, is taken as (4) ſmall tithes; but where the principal part of the pariſh is graſs ground, there is no inſtance, I elieve, where the tithe of hay is not taken by the rector.

Another deciſion controverted by the compiler.

There being another deciſion reſpecting clergyman's law, which does not ſeem to me to be either legally or reaſonably founded, I preſume to offer my thoughts on it, and with the ſame deference, however, I have ſubmitted them on the preceding points.

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(1) *Gumley* and *Burt*, *T.* 11 *Geo.* I. p. 206.

(2) *Comb.* 209.

(3) *Anſon* and others, and *Nicholas*, *H.* 4 *Geo.* p. 132.

(4) See *Hodgſon* and *Smith*, *T.* 1 *Geo.* I. p. 129. or where the vicar is expreſsly endowed of hay. *Pomfret* and *Lavender* & others, *T.* 32 *Car.* II. p. 64. 362, 363. *Barkſdale* and *Smith*, *poſt*, p.

It

It is ſaid by Lord (1) *Coke*, that an infant heir having the right of patronage, ſhall preſent to the church, of what age ſoever he be; this opinion is adopted by the ſame Dean (2) *Watſon*; and Lord Chancellor (3) *King* was of the ſame opinion in *Chancery*, in the caſe of *Arthington* and (4) *Coverley*, and ſaid, that if the infant was but a year old, or younger, they ought to put a pen in his hand, and guide it to ſign the preſentation; but it hath been ſaid, and ſeems the moſt reaſonable method, that if the heir be within the years of diſcretion, the guardian (5) ſhall preſent, for no moral act can be imputable to an infant within years of diſcretion; and the notion of making an infant act by guiding the pen in his hand, ſeems abſurd; and the reaſon given by Lord *Coke* why the guardian ſhall not preſent, is not eaſily to be underſtood, which is, that ſimony is odious, therefore a guardian ſhall not preſent, becauſe he can take nothing for which he may account to the heir; admit this, will guiding the pen in the infant's hand prevent ſimony; or can there be any eſſential difference between allowing the guardian to guide the infant's hand, and permitting him to ſign his own name.

Lord *Coke*'s opinion doubted.

Dean *Watſon*'s and Lord Chancellor *King*'s.

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(1) 3 *Inſt.* 156. Lord Chancellor *Hardwicke* not only adopts Lord *Coke*'s opinion, but adds another reaſon why an infant may preſent to a church, in theſe words, *viz.* "but the ſtrong ground the law goes on is this, there can be no inconvenience, becauſe the biſhop is to judge of the qualification of the clerk preſented." *Hearle* and *Greenbank*. *Andrews* & others, aſſignees, *&c.* and *Greenbank* & others, *E.* 22 *Geo.* II. 3 *Tr. Ark.* 710.

(2) *Clergyman's Law*, or *Complete Incumbent*, p. 140.

(3) 2 Eq Caſ. Abr. 518. pl. 3. 675. pl. 1. 4 *Vin.* Abr. 530. pl. 10.

(4) This caſe is ſaid to have been determined, *H.* 6 *Geo.* II. 1732. in Eq. Caſ. Abr. and in *M.* 4 *Geo.* II. in *Vin.* Abr. however A. D. 1732, does not comport with either 4 or 6 *Geo.* II.

(5) *Cro. Jac.* 99.

Manner of ſetting out tithes.

Notwithſtanding (1) the canon, the manner or form of ſetting out or payment of tithes is, for the moſt part, governed by the cuſtom of the place.

The parſon may ſee his tithe ſet out.

Every perſon is bound of common (2) right, to cut down, and ſet out the tithes of his own lands; and that it may be done faithfully and without fraud, the laws of the church (3) intitle the parſon to have notice given him, but by the declaration of of the common law, ſuch notice is not neceſſary; yet, nevertheleſs the common law declareth a cuſtom of tithing without (4) view to be an abuſed cuſtom: and by ſtat. 2 & 3 *Edw.* VI. chap. (5) 13. at all times whenſoever, and as often as any prædial tithes ſhall be due, at the tithing of the ſame, every party to whom any of the ſaid tithes ought to be paid, or his deputy or ſervant, may view and ſee their ſaid tithes to be juſtly and truly ſet forth, and ſevered from the nine parts.

III. *To whom Tithes are due, and herein of Tithes in extra-parochial Places.*

Arbitrary conſecration of tithes deſcribed.

UPON their firſt (6) introduction, though every man was obliged to pay tithes in general,

(1) 3 *B.* E. L. 476.

(2) 3 *B.* E. L. 477.

(3) This eccleſiaſtical cuſtom was held to be good at common law, by the unanimous opinion of the whole court of *King's Bench*, in *Eaſter* Term, 6 *Geo.* III. 3 *Bur.* Rep. 1891.

(4) *Boughton* and *Wright*, *H.* 11 *Geo.* I. p. 202. *Chriſtian* and *Wrenn*, & others, *M.* 5 *Geo.* II. p. 336. The farmer may not throw nine ſheaves into the cart, and leave the tenth for the parſon, becauſe the tithe muſt be ſet out before the nine parts are removed; this manner of ſetting out tithes, is called tithing by the fork in the neighbourhood of *Barrow*, in the county of *Suffolk*, and is a very fraudulent method of tithing, being in effect tithing *abique viſu et tactu*. See 6 *Com.* Dig. 303.

(5) See this ſtatute at large in our appendix, p. 1249.

(6) 1 *Black.* Com. 111. 2 *Black.* Com. 26.

yet

yet he might give them to what prieſt he (1) pleaſed, which was called *arbitrary* conſecration of tithes; or he might pay them into the hands of the biſhop, who diſtributed among his dioceſan clergy, the revenues of the church, which were then in common; but when dioceſes were divided into (2) pariſhes, the tithes of each pariſh were allotted to it's own particular miniſter, firſt by common conſent, or the appointments of the lords of manors, and afterwards by the written law of the land.

However, arbitrary conſecrations of tithes took place again afterwards, and became in general uſe till the time of King *John*; which was probably owing to the intrigues of the regular clergy, or monks of the *Benedictine* and other rules, under

(1) It is ſaid by Lord *Coke* (2 *Inſt.* 46.) that before the year 1180, a man might have given his tithes to what church or monaſtery he pleaſed; but this Doctor *Prideaux* (302) doth utterly deny, for two reaſons; 1. Becauſe of the abſurdity of the thing, for all the laws which had been made for tithes, would have ſignified nothing, if no one had been certainly inveſted with a right to them; for in ſuch caſe, no one could claim them; and in caſe of non-payment, no one could make proceſs in law for them; and conſequently no one having a ſpecial right to demand them, it muſt have followed in practice, that what was thus paid to *every* ſpiritual perſon, would in fact and reality be paid to *none*. 2. Beſides, before the council of *Lateran*, there were in this land many impropriations, whereby the tithes of whole pariſhes were aſſigned to convents, or other ſpiritual corporations, all which would have ſignified nothing, if the pariſhioners had been at liberty to pay their tithes to what ſpiritual perſons they ſhould think fit; but be that as it will, ſays Dr. *Burn*, (3 *B. E. L.* 377) it is certain, that now tithes of common right do belong to that church, within the precinct of whoſe pariſh they ariſe.

(2) Before the council of *Lateran*, there were no pariſhes, nor pariſh prieſts to claim tithes, *Hob.* 296. But it appears from the *Saxon* laws, that pariſhes were in being long before the date of that council of *Lateran*, to which they are aſcribed by *Hobart*, 1 *Black.* Com. 112.

Archbiſhop *Dunſtan* and his ſucceſſors, who endeavoured to wean the people from paying their dues to the ſecular or parochial clergy (a much more valuable ſet of men than themſelves, in the opinion of Sir *William* (1) *Blackſtone*) and were then in hopes to have drawn, by ſanctimonious pretences to extraordinary purity of life, all eccleſiaſtical profits to the coffers of their own ſocieties; and this will naturally enough account for the number and (2) riches of the monaſteries and religious houſes, which were founded in thoſe days, and frequently endowed with tithes; for a layman, who was obliged to pay his tithes ſomewhere, might think it good policy to erect an abbey, and there pay them to his own monk, or grant them to ſome abbey already erected; ſince for this dotation, which really coſt the patron little or nothing, he might, according to the ſuperſtition of the times, have maſſes for ever ſung for his ſoul; but in proceſs of years, the income of the poor (3) *laborious* pariſh prieſts being ſcandalouſly reduced by theſe arbitrary conſecrations of tithes, it was remedied by Pope *Innocent* the *Third*, about the year 1200, in a decretal epiſtle, ſent to the Archbiſhop of *Canterbury*, and dated from the palace of *Lateran*, which occaſioned Sir *Henry Hobart* (according to Mr. Juſtice (4) *Blackſtone*) and others to

They were remedied by Pope *Innocent* III.

Lord Chief Juſtice *Hobart* miſtaken.

(1) 2 *Black.* Com. 27.

(2) See our obſervations on ſtat 27 *Hen.* VIII. chap. 28. p. 1174. and on ſtat. 32 *Hen.* VIII. chap. 24. p. 1256.

(3) The *Labourer* is worthy his hire, *Chapman* and others, and *Manſin* and others, *H.* 3 *Geo.* II. p. 1116. See our vindication of the clergy. *Poſt.* p.

(4) 2 *Black.* Com. 27.

called

miſtake it for a decree of the council of (1) *Lateran* held in the year 1179, which only prohibited what was called the (2) infeodation of tithes, or their being granted to mere laymen; whereas this letter of Pope *Innocent* to the archbiſhop enjoined the payment of tithes to the parſons of the reſpective pariſhes, where every man inhabited; agreeable to what was afterwards directed by the ſame Pope in other countries; this (3) epiſtle, ſays Sir *Edward* (4) *Coke*, bound not the lay ſubjects of the realm; but being reaſonable and juſt (and, he might have added, (in the opinion of the (5) commentator) correſpondent to the ancient law) it was allowed of, and ſo became *lex terræ*.

Infeodation of tithes.

Sir *Edward Coke* and Mr. Juſtice *Blackſtone* commend the Pope's epiſtle.

This put an effectual ſtop to all the arbitrary conſecrations of tithes, except ſome footſteps which ſtill continue in thoſe (6) portions of tithes, which

Portion of tithes.

(1) So named, becauſe it was holden in the Pope's palace at *Rome*, called *Lateran*. See *poſt*, p. lviii. n.

(2) See Corporation of *Bury* & others, and *Evans*, under *E.* 12 *Geo.* II. p. 371, 372.

(3) See copy of this original epiſtle, with a tranſlation, in "The great caſe of tithes, truly ſtated, clearly opened, and fully reſolved, by *Anthony Pearſon*, formerly a juſtice of peace in *Weſtmoreland*," firſt publiſhed about the year 1657, and laſtly in the year 1702, p. 21. n.

(4) 2 Inſt. 641.

(5) 2 *Black.* Com. 27, 28.

(6) One parſon may preſcribe to have tithes within the pariſh of another, and this is what is called "*portion of tithes*," *Gibſ.* 663. and ſee Corporation of *Bury* & another, and *Evans*, *E.* 12 *Geo.* II. p. 371. *Baily* and *Worrall*, *T.* 9 *Geo.* I. p. 167. *Downes* and *Moorcman*, *H.* 11 *Geo.* I. p. 302. one reaſon of which may be, the lord of a manor's having his eſtate extending into what is now apportioned unto diſtinct pariſhes, 3 *B. E. L.* 377. for there were tithes before the preſent diſtribution of pariſhes took place, 1 *B.* E. L. 60, 61. 3 *B.* E. L. 377.

the parſon (1) of the pariſh hath, though rarely (ſays the (2) Judge) a right to claim in another; for it is now (3) univerſally held, that tithes are due of common (4) right, to the parſon of the pariſh, unleſs there be a ſpecial exemption.

Tithes are due of common right.

Parſon deſcribed.

This parſon of the pariſh may be, either the actual incumbent, or elſe the appropriator of the benefice; appropriations being a method of endowing monaſteries, which ſeems to have been deviſed by the regular clergy, by way of ſubſtitution to arbitrary conſervations of tithes.

Extra parochial tithes.

Foreſts.

Some (5) lands, either becauſe they were in the hands of irreligious and careleſs owners, or were ſituate in foreſts and deſart places, or for other now unſearchable reaſons, were never united to any pariſh, and therefore continue to this day extraparochial; and their tithes are now by immemorial cuſ-

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(1) The diſtinction of a parſon and vicar is this; the parſon has, for the moſt part, the whole right to all the eccleſiaſtical dues in his pariſh; but the vicar has generally an appropriator over him, entitled to the beſt part of the profits, to whom he is in effect perpetual curate, with a ſtanding ſalary. 1 *Black.* Com. 388.

(2) 2 *Black.* Com. 28.

(3) *Gibſ.* 663. 3 *B. E.* L. 377. See *Fox* and *Ayde, E.* 3 *Geo.* II. p 284. *Fox* and *Rutty, M.* 8 *Geo.* I. p. 159. *Buſh* and *Riſbley, M.* 22 *Car.* II. p. 41. *Dodſon* and *Olrver, E.* 8 *Geo.* I. 155. *Ekins* and *Dormer, T.* 20 and 21 *Geo.* II. p. 425. *Chapman* and *Smith, T.* 27 and 28 *Geo.* II. p. 478. *Whitehead* and *Travis, H.* 19 *Geo.* III. p. 876. Doctor *Blair* and *Cholmley*, & others, *T.* 5 *Geo.* III. p. 546. Lady *Charlton* and Sir *Blundel Charlton, H.* 5 *Geo.* II. p. 337. *Cart* and *Ball, E.* 20 *Geo.* II. p. 418.

4) Common right is the ſame thing as common law, Gr. and Rud. of Law and Eq. 338.

(5) 1 *Black*, Com. 113.

tom payable to the (1) King, who has a right by virtue of his (2) royal prerogative to all the tithes in extraparochial places, inſtead of the biſhop, who, by the canon (3) law, was to diſpoſe of them, at his diſcretion; though (4) perhaps it may be doubted how far tithes ariſing in extraparocial places, can be properly reckoned a part of the King's own royal revenue; ſince a corody ſupports only his chaplains; and theſe extraparochial tithes are held under an implied truſt and confidence, that the King will diſtribute them for the good of the church, and of the clergy in (5) general.

Payable to the King.

But this doubted by Sir *William Blackſtone*.

And as (6) by the law of *England* all theſe extraparochial tithes do belong to the crown, they may be granted to whom the King pleaſes; and accordingly they have been actually adjudged to his leſſee, not only by ſeveral reſolutions of law, but alſo in parliament, in the caſe of the prior and biſhop of *Carliſle*, 18 *Edw.* I. concerning tithes in *Inglewood* foreſt, to wit, that the King, in his foreſt aforeſaid, may build towns, aſſart lands (*i. e.* make them fit for tillage) and confer thoſe churches, with the tithes thereof, at his pleaſure, upon whomſoever he pleaſ-

Theſe tithes have been adjudged to the King in parliament, as well as in *Weſtminſter* hall.

Prior and the Biſhop of *Carliſle*.

Inglewood foreſt.

Aſſarting lands defined.

(1) The King is *perſona mixta*, a ſpiritual as well as a lay perſon, and tithes have at all times, particularly thoſe ariſing from extra-parochial places, been part of his revenue. *Travis* and *Whitehead*, & others, T. 17 *Geo.* III. p. 806.

(2) 2 *Black.* Com. 28. n.

(3) 3 *B.* E. L. 377.

(4) 1 *Black.* Com. 284.

(5) 1 *Black.* Com. 113. 284.

(6) 3 *B.* E. L. 377.

eth, becauſe that the ſame foreſt is not within the limits of any pariſh.

Stat. 17 *Geo.* II. chap. 37. reſpecting rating tithes in extra-parochial places.

Extraparochial (1) waſtes and marſh lands, when improved and drained, are to be aſſeſſed to all parochial rates, in the pariſh next adjoining, as appears by ſtat. 17 *Geo.* II. chap. 37. whereby it is enacted (by ſect. 1.) that where there ſhall be any diſpute in what pariſh or place, improved waſtes, and drained and improved marſh lands lie, and ought to be rated; the occupiers of ſuch lands, or houſes built thereon, *tithes ariſing therefrom*, mines therein, and ſaleable under-woods, ſhall be rated to the relief of the poor, and to all other pariſh rates, within ſuch pariſh and place, which lies neareſt to ſuch lands; and if, on application to the officers of ſuch pariſh or place, to have the ſame aſſeſſed, any diſpute ſhall ariſe; the juſtices of the peace at the next ſeſſions after ſuch application made, and after notice given to the officers of the ſeveral pariſhes and places adjoining to ſuch lands, and to all others intereſted therein, may hear and determine the ſame, on the appeal of any perſon intereſted, and may cauſe the ſame to be equally aſſeſſed; whoſe determination therein ſhall be final. But (by ſect. 2.) this ſhall not determine the boundaries of any pariſh or place other than for the purpoſe of rating ſuch lands to the relief of the poor, and other parochial rates.

(1) 1 *Blackſt. Com.* 113.

IV. Who

IV. *Who may be diſcharged or exempted from the Payment of Tithes; and herein, of Compoſitions real, Cuſtoms or Preſcriptions, and* Moduſes.

1. *By Compoſitions real.*
2. *By Cuſtom or Preſcription.*

1. *By Compoſitions real.*

Compoſition real, defined.

A Compoſition (1) real is, when an agreement, under a lord is made between the owners of the land, and the parſon or vicar, with the conſent of the ordinary and patron, that ſuch lands ſhall for the future be diſcharged from the payment of tithes, by reaſon of ſome land or other real recompence given to the parſon, in lieu and ſatisfaction thereof; this was permitted by law, becauſe it was ſuppoſed, that the clergy would be no loſers by ſuch compoſition, ſince the conſent of the ordinary, whoſe duty it is to take care of the church in general, and of the patron, whoſe intereſt it is to protect that particular church, were both made neceſſary to render the compoſition effectual; and hence have ariſen all ſuch compoſitions as exiſt at this day by force of the common law; but, experience ſhewing that even this caution was ineffectual, and the poſſeſſions of the church being, by this and other means, every day diminiſhed, the diſabling ſtatute of 13 *Eliz.* (2) chap. 10. was made; which prevents, among other

13 *Eliz.* chap. 10.

(1) *Ekin* and *Piget*, *H.* 18 *Geo.* II. p. 403. *Ekins* and *Dormer*, *T.* 20 & 21 *Geo.* II. p. 428. Attorney General and *Bowles*, *T.* 27 & 28 *Geo.* II. p. 487.

(2) See this ſtatute at large, in the "Appendix, p. 1258." and our obſervations on the cauſe of *Bree* and *Chaplin*, in our VIth head of this introduction, and alſo *poſt*.

ſpiritual

ſpiritual perſons, all parſons and vicars from making any conveyances of the eſtates of their churches, other than for three lives, or twenty-one years; ſo that now by virtue of this ſtatute, no real compoſition, made ſince 13 *Eliz.* is good for any longer term than three lives, or twenty-one years, though made by conſent of patron and ordinary, which has indeed effectually demoliſhed this kind of traffick, ſuch compoſitions being now rarely heard of, unleſs by authority of (1) parliament.

No compoſition now valid, but by act of parliament.

2. *By Cuſtom or Preſcription.*

Cuſtom or preſcription defined.

A Diſcharge by cuſtom or preſcription is, where, time out of mind, ſuch perſons or ſuch lands have been, either partially or totally, diſcharged from the payment of tithes; and this immemorial uſage is binding upon all parties; as it is in its nature evidence of univerſal conſent and acquieſcence, and with reaſon (2) ſuppoſes a real compoſition to have been formerly made; this cuſtom or preſcription is either (3)

1. *De modo decimandi.*
2. *De non decimando.*

1. *De modo decimando.*

Modus defined.

A *Modus decimandi*, commonly called by the ſimple name of a *modus* only, is where there is by cuſtom a particular manner of tithing allowed,

(1) See Attorney General and *Cholmley*, *T.* 5 *Geo.* III. p. 549. n.

(2) *Chapman* and Biſhop of *Lincoln*, *H.* 3 *Geo.* II. p. 273. *Chaplin* and *Bree*, under *H.* 15 *Geo.* III p 646.

(3) 3 *B.* E. L. 397.

different

different from the general law of taking tithes in kind, which are the actual tenth part of the annual increaſe; this is ſometimes a pecuniary compenſation as two-pence an acre for the tithe of land, ſometimes it is a compenſation in work and labour, as that the parſon ſhall have only the twelfth cock of hay, and not the tenth, in (1) conſideration of the owner's making it for him; ſometimes in lieu of a large quantity of crude or imperfect tithe, the parſon ſhall have a leſs quantity, when arrived to greater maturity, as a couple of fowls, in lieu of tithe eggs, and the like; any means, in ſhort, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or ſpecial manner of tithing.

To make a good and ſufficient *modus*, the following rules muſt be (2) obſerved,

Firſt, Every *modus* muſt be (3) *certain* and (4) invariable, for payment of different ſums will prove

Muſt be certain and invariable.

(1) See the caſe of *Fox* & others, and *Ayde* & others, under *E.* 3 *Geo.* II. p. 284, 285.

(2) 2 *Black.* Com. 30. *Travis* and *Whitehead*, & others, *M.* 16 *Geo.* III. p. 775.

(3) *Bohn* and *Lee*, *T.* 11 *Ann.* p. 121, 122. *Shepter* and *Mitchel*, *H.* 2 *Geo.* I. p. 126. *Chapman* & others, and *Monſon* & others, *H.* 3 *Geo.* II. p. 1107. 1113, 1114. Sir *Edward Blackett* and Dr. *Finny*, *T.* 11 *Geo.* I. 221. *Webber* and *Taylor*, *M.* 11 *Geo.* I. 215, 216. *Hardcaſtle* & another, and *Slater*, *T.* 18 *Geo.* II. 405, 406, 407, 408. *Gibbs* and *Goodman*, *T.* 6 & 7 *Geo.* II. 338, 339. *Modus* to pay four ſhillings for every day's plowing of wheat, and two ſhillings for every day's plowing of barley, hath been adjudged to be ill, it being uncertain how much every day's ploughing was. 3 *B.* E. L. 408. And the worthy author cites, in ſupport of this, 2 *P. Will.* 462. and 2 *Salk.* 657. but our diligence finds no ſuch matter mentioned in either of thoſe books of reports.

(4) *Bree* and *Chaplin*, *M.* 13 *Geo.* III. p. 625. *Travis* and *Whitehead* & others, M. 16 Geo. III. p. 775.

it

it to be no *modus*, that is no original real compoſition, becauſe that muſt have been one and the ſame from it's commencement to the preſent time.

Muſt be ſomething for the parſon's benefit.

Secondly, The thing given in lieu of tithes muſt be beneficial (1) to the *parſon*, and not for the emolument of third *perſons* only (2), thus, a *modus* to (3) repair the *church* in lieu of tithes, is not good, becauſe that is an advantage to the pariſh only, but to repair the (4) *chancel* is a good *modus*, for that is an advantage to the parſon.

Muſt be different in kind from the thing due.

Thirdly, It muſt be ſomething *different* from the thing compounded for (5); one load of hay in lieu of all tithe hay, is (6) no good *modus*; for no parſon would *bonâ fide* make a compoſition to receive leſs than his due in the ſame *ſpecies* of tithe; and therefore the law will not ſuppoſe it poſſible for ſuch compoſition to have exiſted (7).

Muſt not be one tithe in lieu of another.

Fourthly, You cannot be diſcharged from payment of one *ſpecies* of tithe, by paying a *modus* for

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(1) *Brac* and *Chaplin*, *M.* 13 *Geo.* III. p. 625. *Travis* and *Whitehead* & others, *M.* 16 *Geo.* III. p. 775.

(2) 2 *Black.* Com. 30.

(3) *Chapman* & others, and the Biſhop of *Lincoln* & others, *H.* 3 *Geo.* II. p. 271.

(4) *S. C. S. T.* and *S. P.*

(5) But it hath been ſaid, that this holds only in caſe of things *jure* titheable, and not if by cuſtom only. 3 *B. E. L.* 437.

(6) Archbiſhop of *York* and Duke of *Newcaſtle*, *M.* 3 *Ann.* p. 99. *Majon* and *Holton*, *T.* 9 *Geo.* I. p. 1099. *Fox* & others, and *Ayde* & others, *E.* 2 *Geo.* II. p. 284. 285, 1103. *Torriano* and *Legge* & others, *T.* 3 *Geo.* III. p. 520.

(7) 3 *B. E. L.* 402.

another

another [1]; thus a *modus* of one penny for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle (2); for tithe is of common right due for both (3); and therefore a *modus* for one shall never be a discharge for the other.

Fifthly, The recompense must be in it's nature as durable as the tithes discharged by it (4), that is, an inheritance certain (5); and therefore a *modus*, that every *inhabitant* of an house shall pay four-pence a year, in lieu of the owner's tithes, is no good *modus* (6); for possibly the house may not (7) be inhabited, and then the recompense will be lost. Must be durable.

Sixthly, The *modus* must be (8) ancient, and therefore if it is any thing near the present value of the tithe, it will be supposed to be of late commencement, and for that reason will be set aside; nor must a *modus* be too (9) large, which in law Must be ancient, and not rank

(1) *Fox* & others, and *Hyde* & others, under *E.* 3 *Geo.* II. p. 282. *Torriano* and *Legge*, *T.* 3 *Geo.* III. p. 522.

(2) 3 *B.* E. L. 406.

(3) 2 *Black.* Com. 30. See *post.*

(4) *Hardcastle* and *Smithson* & another, under *T.* 18 *Geo.* II. p. 407.

(5) 2 *Black.* Com. 30. See *post.*

(6) *Chapman* and others, and Bishop of *Lincoln* & others, *H.* 3 *Geo.* II. p. 257, 1104, 1107, 1117, 1120.

(7) *Carleton* and *Brightwell*, *T.* 2 & 3 *Geo.* II. p. 249.

(8) 3 *B. E. L.* 412.

(9) *Black.* Com. 30.

is called a *rank* (1) *modus*, as if the real value of the tithes be 60 *l.* a year, and a *modus* is ſuggeſted of 40 *l.*

(1) See the caſes of *Bayfield* and *Antecknap*, *H.* 8 *Will.* III. p. 83. 84. *Benſon* and *Watkins*, *H.* 3 *Geo.* I. p. 1092. *Lloyd* and *Small*, *H.* 4 *Geo.* I. p. 1093. and *Franklin* and *Jenkins*, *T.* 7 *Geo.* I. p. 1096. *Chapman* and *Smith*, *T.* 27 & 28 *Geo.* II. p. 469, 470. *Ekin* and *Pigot*, *H.* 18 *Geo.* II. p. 404. And the reaſon theſe decrees go upon is this: That the *value of money being much greater at the time when all* moduſes *are preſumed to have begun, than it is now*, a *modus* near the value of the tithes at this day, muſt have been at that time a great deal more; and it is not to be ſuppoſed, that the pariſhioners would at any time give ſo much more than the value of their tithes. 3 *B.* E. L. 413.

Where (*a*) a pecuniary *modus* obtains, it is certain, that in many places, it was at or near the full value, at the time of its original as a groat for a tithe lamb, or for the tithe of an acre of hay; for it may be eaſily proved, that before the *American* wealth began to be imported into *Europe*, money was oftentimes, perhaps, of twenty times the value, in proportion to the fruits of the earth, that it is at preſent; add to which, that the nominal value of money has been trebled; as for example, an (*b*) ounce of ſilver coin, which, in the reign of King *Edward* the *Firſt*, was worth only twenty pence, was by King *Edward* the *Third*, and his ſucceſſors, down to King *Edward* the *Sixth*, gradually raiſed to ſixty pence, and continues about that value at this day; ſo that in effect, the arbitrary raiſing the nominal value of money deprives all perſons intitled either to annual or other periodical rents, fees, or revenues, and alſo to whom groſs ſums of money were due, of ſo much of their reſpective demands, as the difference between the old and new nominal value amounts to; but alas! I cannot but obſerve, as a lawyer of humanity, that not only the property of the ſubject is affected by this difference in the comparative value of money, now and formerly, but that his life is alſo put into jeopardy thereby; for though anciently the puniſhment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ranſom, but in 9 *Hen.* I. it was enacted, that whoever was convicted of theft (or any other (*c*) felony) ſhould be hanged, and the liberty of redemption

(*a*) See the caſes of *Gifford* and *Webb*. *E.* 9 *Geo.* II. p. 347, 348. *Ekins* and *Pigot*, *T.* 18 *Geo.* II. p. 404, 405. *Chapman* and *Smith*, *E.* 27 & 28 *Geo.* II. p. 471. See alſo 2 *B. E. L.* 343. 3 *B. E. L.* 402. 459. 519.

(*b*) For the hiſtory of this enhancing ſee *H H. P. C.* 209, 201, 202.

(*c*) 3 Inſt. 53.

40 *l.* this *modus* will not be good; though one of the 40 *s.* might have been valid.

As neither 11 *Mod.* 60 (the reference to ſupport what is ſaid in *Blackſtone*, as to a *rank modus*) nor the

A ſuppoſed miſtake of Sir *W. B.* corrected.

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redemption was intirely taken (*a*) away; this law ſtill remains at this day, but conſidering the alteration in the value of money, the ſeverity of it is much greater now than then, for twelve (*b*) pence would then purchaſe as much as forty ſhillings will now, and yet the theft of above the value of twelve pence is ſtill liable to the ſame puniſhment, upon which Sir *Henry Spelman* juſtly obſerved, and complained above a century ſince, (when money was at twice its preſent rate) that while all things elſe had roſe in their nominal value, and grown dearer, the life of man had continually become much cheaper; from hence that learned lawyer takes occaſion to wiſh, that the ancient tenderneſs of life were again reſtored. *H. H. P. C.* 12. n. 4 *Black. Com.* 238. 3 *B. J. P.* 63. and during this long interval the grievance has been gradually increaſing, and ſtill remains unredreſſed. *Ed. Prin. Pen. Law*, 292.

But the error lies deeper: *money, which in it's nature is of fluctuating value, is in no caſe proper to be made the ſtandard meaſure of criminality*; when the puniſhment of the offender depends on the value of the thing, the adjudication of the law is vague and uncertain; mercy alſo is admitted under the ſhield of interpretation; the impulſes of benevolence are oppoſed to the obligations of religion; and jurors are taught to trifle with their oaths, and to call ſuch trifling, "a kind of pious (*c*) perjury."

In fact, upon trials of larcenies ſo limited, it is commonly found to be the chief anxiety, both of judges and of jurors, to reduce the crime below it's real predicament; by reducing the conviction below the value affixed by law; ſuch an anxiety is the natural conſequence of laws, which, by an abſurd diſtinction, make a trivial difference between two ſums for the criterion of a capital offence: and enact, that a penny more or leſs ſhall be equivalent to the life of a man (*d*).

As

(*a*) *Will. Leg. Angloſax.* p. 304.

(*b*) Which ſum was the ſtandard in the time of King *Athelſtan*, eight hundred years ago; and in the reign of King *Hen.* I. the ſtated value at the *Exchequer*, of a paſture fed ox was one ſhilling, *Anc. Dial. Exchq. B.* 1. chap. vii. which if we ſhould even ſuppoſe to mean the *ſolidus legalis*, or the ſeventy-ſecond part of a pound of gold, is only equal to 13 *s.* 4 *d.* of the preſent ſtandard. 4 *Black.* Com. 237. n.

(*c*) 4 *Blackſt.* Com. 238. *Ed. Prin. Pen. Law*, 292, 293.

(*d*) *Ed. Prins. Pen. Law*, 293.

day for the payment thereof is limited, the ſame ſhall be due and payable on the laſt day of the year.

Suppoſition of law, as to preſcriptive or cuſtomary *moduſes*.

Upon the whole, in all (1) theſe caſes of preſcriptive or cuſtomary *moduſes* the law ſuppoſes an original real compoſition to have been regularly made; which being loſt by length of time, the immemorial uſage is admitted as evidence to ſhew, that it once did exiſt, and that from thence ſuch uſage was derived; now time of memory hath been long ago aſcertained by the law to commence from the reign of *Richard* the *Firſt* (2); and any cuſtom may be deſtroyed by evidence of it's non-exiſtence in any part of the long period from his days to the preſent; wherefore, as this real compoſition is ſuppoſed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* ſet up is ſo rank and large, as that it beyond diſpute exceeds the value of the tithes in the time of *Richard* the *Firſt*, this *modus* is *felo de ſe*, and deſtroys itſelf; for as it would be deſtroyed by any direct evidence, to prove it's non-exiſtence at any time ſince that *æra*, ſo alſo, it is deſtroyed by carrying in itſelf this internal evidence of a much later original (3).

Time of legal memory defined.

(1) 2 *Blackſt.* Com. 30, 31.

(2) This rule was adopted, when by ſtat. *Weſtm.* 1. [3 *Edw.* I. chap. 39.] the reign of King *Richard* the *Firſt*, was made the time of limitation in *a* writ of right; but ſince by ſtat. 32 *Hen.* VIII. chap. 2. this period (in a writ of right) hath been very rationally reduced to ſixty years; it ſeems (ſays Sir *William Blackſtone*) unaccountable, that the date of legal preſcription, or memory, ſhould ſtill continue to be reckoned from an *æra* ſo very antiquated. 2 *Black.* Com 31. n. 3 *B.* E. L. 417. n. the laws of *England*, by a pretty extraordinary law (and which Lord Chancellor *Hardwicke* believed no other country did) makes time out of mind from the tranſportation of *Richard* the *Firſt*, to the holy land. *Chapman* and *Smith*, T. 27 & 28 *Geo.* II. p. 479.

(3) 2 *Black.* Com. 31. See Lord *Brownlow* and *Devie*, T. 22 *Geo.* III. p. 1014. *in calem.*

No

No *modus* (1) can be eſtabliſhed at this day, but by act of parliament; an agreement by patron, parſon, and ordinary, confirmed and eſtabliſhed by a decree in equity, can only bind the parties thereto, becauſe no man's property can be affected but by the law of the (2) land.

No *modus* but by act of parliament; agreement though confirmed by decree will not do.

As (3) every conſideration will not make a good *modus*, ſo a *modus*, though founded upon good conſideration, may be ſeveral ways diſcharged, and tithes become due in kind; as where land is converted to other uſes; ſo, when the preſcription is for hay and graſs, eſpecially, in ſo many acres of land; if the land is converted into an hop-garden, the preſcription is gone.

Modus how deſtroyed.

It (4) hath been queſtioned, where a park hath paid a *modus*, and is diſparked, whether the *modus* ſhall continue, or be diſcharged and tithes paid in kind; and all the books are clear, that if the *modus* was a certain conſideration in money for all the tithes of ſuch a park, ſuch *modus* ſhall hold, notwithſtanding it be diſparked; but if the *modus* was for the deer and herbage of ſuch a park, the *modus* is gone, upon diſparking.

Modus for a park.

In like manner, if the *modus* had been to pay a buck and a doe for all the tithe of ſuch a park, and

(1) 3 *B.* E. L. 403.

(2) Attorney General and *Cholmeley* & others, *T.* 5 *Geo.* III. p. 523.

(3) 3 *B.* E. L. 428. *Stockwell* and *Terry*, *T.* 22 & 23 *Geo.* II. p. 448.

(4) *Gibſ.* 684.

the park is diſparked, the (1) *modus* ſhall continue, and the owner may give a buck and a doe out of another park; but if it was to pay the ſhoulders of every deer, or expreſsly a buck or a doe out of the ſame park, the *modus* is gone.

Court divided in opinion, as to a *modus* for a park, being part in money and part in veniſon, whether it was gone on the park being diſparked.

But where the *modus* was, part in money and part in veniſon out of the park, (namely two ſhillings, and the ſhoulder of every (2) *third* deer) the court was divided, two (3) being of opinion, that the two ſhillings continued, and that the ſpiritual court ſhould aſſign an equitable recompence for the ſhoulders, according to the number that had been uſually paid; and the other (4) two, that the money and veniſon making one entire *modus*, the one being gone, the whole was diſſolved.

All pecuniary compoſitions become inſufficient from value of money decreaſing.

After (5) all, theſe pecuniary compenſations, however reaſonable at firſt, muſt in proceſs of time become inſufficient, as the value of money (6) decreaſeth; and this hath been the caſe of all *moduſes*, which, at the time of their commencement, were the real value of the tithes; on the other hand, it muſt be acknowledged, that the payment of tithes in

(1) See *Stockwell* and *Terry*, T. 22 & 23 *Geo.* II. p. 446. 448.

(2) *Gedb.* 237. pl. 329. 1 *Rol.* Rep. 120. pl. 4. Mo. 863. pl. 1186. *Hob.* 39. *See Hardcaſtle* & another, and *Slater*, under T. 18 *Geo.* II. p. 408.

(3) *Viz. Nicholl* and *Hobart*, Ch. J. *Hob.* 39. marg. *Mo.* 863. pl. 1186. *Rol.* Rep. 120. pl. 4.

(4) *Viz. Winch* and *Warburton*. *Hob.* 39. marg. *Mo.* 863. pl. 1186. *Rol.* Rep. 120. pl. 4.

(5) 3 *B.* E. L. 519.

(6) See *ante*, xiv. a.

kind

kind is in many reſpects troubleſome and inconvenient.

If a method could be eſtabliſhed, that the miniſter ſhould receive an equivalent, durable, and not liable to diminution by the fluctuation of money, the people generally would be deſirous to purchaſe their tithes at the higheſt ſuppoſable eſtimation; which if employed in a purchaſe of land, the value thereof would continue in proportion as the tithes would have done, foraſmuch as the annual rent of the land will always be according to its produce.

What method would remedy the miſchief in the opinion of Dr. *Burn*.

Earl *Mansfield* is reported to have declared to the lords upon the (1) appeal of *Charles Chaplin* Eſq; againſt a decree of the court of (2) *Exchequer*, obtained againſt him by *John Bree*, clerk, that if any noble lord would bring in a bill to provide for the clergy, in a mode more ſuitable to the dignity of their ſacred function, it ſhould have his hearty concurrence and firm ſupport.

Earl *Mansfield*'s declaration in the Houſe of Lords reſpecting this matter.

On this hint Earl *Bathurſt*, then preſident of the council who had been (3) one of the juſtices of the court of *Common Pleas*; lord (4) commiſſioner for the cuſtody of the Great Seal, and alſo lord high (5) chancellor, ſet about, with unwearied aſſi-

Earl *Bathurſt*'s propoſition.

(1) See under *Hilary* Term, 15 *Geo.* III. p. 643.

(2) See under *Michaelmas* Term, 13 *Geo.* III. 620. and our obſervations on this caſe, under VIth head of this introduction.

(3) See "The *Nomenclator of Weſtminſter Hall*," at the end of the Biographical Hiſtory of Sir *William Blackſtone*, octavo edit. 1782. p. 10, 14, 19, 21, 26, 28, 30, 32.

(4) Id. 30.

(5) Id. 33, 36. See id. 3, 4, 6, 7.

duity, to form propoſitions for remedying this real grievance, and accordingly, on 6 *April*, 1781, his lordſhip moved, in the houſe of peers, the following reſolutions as proper ſubjects for the conſideration of a committee to be appointed to ſit ſome day in the following week; the whole ſcope of his lordſhip's plan was, and is, to grant certain portions of land to the parochial clergy, in the lieu of tithes, as being a more eligible mode of providing for them, and calculated to prevent thoſe litigious conteſts, and violent diſſentions, which at preſent prevail between the ſaid clergy and their pariſhioners: his lordſhip ſtated the firſt general reſolution to be, "That it is the opinion of this committee, that the incloſing of waſte lands and foreſts, tends to the benefit of agriculture, and to the advantage of both church and ſtate."

The two other propoſitions ariſing out of this general maxim, reſpected the granting of ſuch incloſed lands for the clergy, in lieu of tithes; if the committee approved of thoſe reſolutions, his lordſhip promiſed to bring in a bill conformable to them, in the then next ſeſſions of parliament.

Oppoſed by *Barrington*, Lord Biſhop of *Landaff*, and by Lord Chancellor *Thurlow*.

The honourable *Shute Barrington*, Lord Biſhop of *Landaff*, oppoſed the propoſitions, and Lord Chancellor *Thurlow* objected to the form of bringing them forward; and thus the matter dropped for that time; however Earl *Bathurſt* ſtill continues his inquiries concerning the fair value of the tithes in all parts of the kingdom, and is determined to purſue and effect, if poſſible, this much deſired (*1*) reformation.

2 *De*

(*) By ſtat. 23 *Geo.* II. chap. 36. a ſtipend is appointed to the rector of St. *George, Southwark*, in lieu of tithes. Stat. 6 *Geo.* II. chap. 11. is for

2. *De non decimando.*

A preſcription *de non decimando* is a claim to be entirely diſcharged of tithes, and to pay no compenſation in lieu of them; thus the king by (1) his prerogative is diſcharged from all tithes; ſo a (2) vicar, ſhall pay no tithes to a rector, nor the rector to the vicar, for (3) "*eccleſia decimas non ſolvit eccleſiæ*;" but theſe perſonal privileges (not ariſing from or being annexed to the land) are individually confined both to the King and clergy; for their tenant or (4) leſſee ſhall pay tithes, though in their own occupation, their lands are not uſually titheable; and, generally ſpeaking it is an eſtabliſhed rule, that, in

Preſcription *de non decimando* deſcribed.

The King, &c. diſcharged.

Vicar pays no tithes to rector, nor *e contra*.

But their tenants or leſſees do.

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for the maintenance of the miniſter of *Horſleydown*; and ſtat 6 *Geo.* II. chap. 21. provides a maintenance for the miniſter of the church in *Old-Street*, in the pariſh of St. *Giles*, *Cripplegate*.

(1) Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo* II. p. 379. 381.

(2) Becauſe they are bound to ſerve the cure. But if the vicar be ſpecially endowed of the ſmall tithes of the glebe lands of the parſonage; then he ſhall have them, though they are in the hands of the appropriator. 3 *B.* E. L. 381.

(3) 2 *Black.* Com. 31.

(4) *Sav.* 3. pl. 8. Biſhop *Gibſon*, *Bohun*, and Dr. *Burn*, all agree that the privilege of lands lying within the precincts of a foreſt (though alſo in a pariſh) if they be in the hands of the King, pay no tithes, extends to the King's leſſee, but not to his feoffee, and that if the foreſt be diſafforeſted, and be within any pariſh, then they ought to pay tithes in the hands of the King's leſſee. 3 *B.* E. L. 380. See the parſon of St. *Buttolph*'s caſe, under *M.* 4 *Car.* I. p. 15. *Roak* & others and *Lee*, under *T.* 29 *Car.* II. p. 50. Corporation of *Bury* & another and *Evans*, under *E.* 12 *Geo.* II. p. 381, 382.

lay hands (1) "*modus de non decimando non valet*," concerning (2) which, the general rule is, that no layman can preſcribe in *non decimando*, unleſs he begin his preſcription in a religious or eccleſiaſtical perſon, and derive a title to it by act of (3) parliament; but ſpiritual perſons or corporations, as monaſteries, abbots, biſhops, and the like, were always capable of having their lands totally diſcharged of tithes, by various (4) ways, *viz.*

Layman cannot preſcribe in *non dec.* unleſs, &c.

Monaſteries, abbots, and biſhops, diſcharged of tithes.

By compoſition.

1. By compoſition real.

By Pope's bull.

2. By the Pope's bull of exemption.

By unity of poſſeſſion.

3. By (5) unity of poſſeſſion; as when the rectory of a pariſh, and lands in the ſame pariſh, both belonged to a religious houſe, whoſe lands were diſcharged of tithes by this unity (6) of poſſeſſion.

4. By

(1) *Mo.* 910. pl. 1281.

(2) 3 *B.* E. L. 397.

(3) *Breary* and *Manby*, *M.* 3 *Geo.* III. p. 510.

(4) See corporation of *Bury* & another and *Evans*, *E.* 12 *Geo.* II. p. ~~375~~ 364

(5) A diſcharge by unity of poſſeſſion muſt be perpetual, and continue ſo to and at the time of the diſſolution. See *Wilſon* and *Redman*, under *M.* 12 *Car.* II. p. 29, and therefore unity of poſſeſſion does not diſcharge a copyholder (though a prior in that caſe was ſeiſed in fee of the manor of which it was parcel, and was alſo impropriator) much leſs a tenant for life or years. *Gibſ.* p. 673. for in ſuch caſe, the poſſeſſion is in the copyholder or other tenant, and not in the landlord or leſſor, and conſequently it is not an unity of poſſeſſion. 3 *B.* E. L. 391. for how many qualities this unity ought to have. See Corporation of *Bury* & another and *Evans*. *E.* 12 *Geo.* II. p. 385, 386.

(6) Stat. 31 *Hen.* VIII. chap. 13. hath made two main changes in the leaming of tithes, *viz.* in that by force of the clauſe of diſcharge, it continued

4. By preſcription, having never been liable to tithes, by being always in ſpiritual hands. By preſcription.

5. By virtue of their order, as the knights *templars*, *Ciſtertians*, and others, whoſe lands were privileged by the Pope, with a diſcharge of tithes. By order.

Though upon the diſſolution of abbies by *Henry the Eighth*, moſt of theſe exemptions from tithes would have fallen with them, and the lands became titheable again; had they not been ſupported and upheld by ſtat. 31 *Hen.* VIII. (2) chap. 13. which enacts, "*that all perſons who ſhould come to the poſſeſſion of lands of any abbey then diſſolved, ſhould hold them free and diſcharged of tithes in as large and ample a manner as the abbeys themſelves formerly held them.*" Exemptions from tithes ſaved on the diſſolution of abbies.

And from this original have ſprung all the lands, which, being in lay hands, do at preſent claim to be tithe free; for, if a man can ſhew his lands to have been ſuch abbey lands, and alſo immemorially diſcharged of tithes, by any of the means before mentioned, this is now a good preſcription *de non decimando*; but he muſt ſhew both theſe requiſites, for From this original, claim to be tithe free, ſprings.

What a good preſcription *de non dec.*

How to ſhew, that abbey lands are diſcharged.

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tinued certain diſcharges which were before that ſtatute, by bull, by compoſition, and by order; and conveyed them over to the King and lay perſons, which alſo would have vaniſhed and diſſolved with the ſpiritual bodies themſelves whereto they were annexed; the next is, that it has created and made one new diſcharge, which was not at common law, *i. e.* the unity of the poſſeſſion of the parſonage and the lands titheable, in one and the ſame hand. *Hob.* 297, 298. *Gr.* and *Rud.* Law and Eq. 336.

(2) *Bul. Ni. Pri* 189. See the ſtatute at large in the Appendix, and our obſervations thereon, and caſes referred to, at the end of the act. This is the *firſt* act of parliament of exemption in reſpect to eſtates belonging to religious houſes thereby diſſolved. Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo.* II. p. 374.

abbey

abbey lands, without a ſpecial ground of diſcharge, are not diſcharged of courſe; neither will any preſcription *de non decimando* avail in total diſcharge of tithes, (1) unleſs it relates to ſuch abbey lands.

History of diſcharge of abbey lands from the payment of tithes.

All (2) abbots and priors and other chief monks originally paid tithes as well as other men, until Pope *Paſcal* the *Second* exempted generally all the religious from paying tithes of lands in their own lands; and this continued as a general diſcharge till the time of King *Henry* the *Second*, when Pope *Hadrian* the *Fourth* reſtrained this exemption to the three religious orders only of *Ciſtertians*, *Templars*, and *Hoſpitalers*, unto which Pope *Innocent* the *Third* added a fourth, to wit, the *Præmonſtratenſes*; and this made up the four orders, which are commonly called the privileged orders, for that they claimed a privilege to be diſcharged of tithe by the pope's eſtabliſhment.

Privileged orders.

Council of *Lateran* as to theſe exemptions.

Then came the general council of (3) *Lateran*, in the year 1215, and further reſtrained the ſaid exemption

(1) See *Wilſon* and *Burton*, under *M.* 12 *Car.* II. p. 28. *Page's* caſe, *H.* 14 & 15 *Car.* II. p. 34. *Collard* and *Newton*, *H.* 32 *Car.* II. p. 58. *Benning* and *Dove*, *T.* 5 *Geo.* I. p. 143. *Hanking* and *Gay*, *H.* 5 *Geo.* I. p. 145. *Breary* and *Manby*, *M.* 3 *Geo.* III. p. 530. Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo* II. p. 386.

(2) 3 *B.* E. L. 381.

(3) Of all the aſſemblies of this kind, which the Chriſtian world ever ſaw, this was the moſt numerous; it was compoſed of more than four hundred biſhops, of about eight hundred abbots and priors, and of an equal number of deputies, from prelates, colleges, and chapters, who could not attend in perſon; among others the *Greek* patriarchs of *Conſtantinople* and *Jeruſalem* were preſent; and the ſeveral patriarchs of *Antioch* and *Alexandria*, ſent each a biſhop and a deacon as their repreſentative.

Theſe

emption from tithes of lands in their own occupation, to thoſe lands, which they were in poſſeſſion of before that council.

But the *Ciſtertians*, as it appeared, in proceſs of time did procure bulls to exempt alſo their lands which were letten to farm; for the reſtraining of which practice, ſtat. 2 *Hen.* IV. chap. 4. was made, by which it was enacted that as well they of the ſaid order, as all other religious and ſeculars, who ſhould put the ſaid bulls in execution, or from thenceforth purchaſe other ſuch bulls, or by colour thereof, ſhould take advantage in any manner, ſhould incur a (1) *præmunire*.

The *Ciſtertians* reſtrained.

2 *Hen.* IV. chap. 4.

So (2) that this ſtatute reſtrained them from purchaſing any ſuch exemptions for the future; and as to the reſt, left their privileges as they were before the ſaid ſtatute, that is to ſay, under a limitation to ſuch lands only as they had before the *Lateran* council aforeſaid; and it is certain, they obtained many lands after that council, which therefore were in no wiſe exempted; and alſo the ſaid ſtatute left them, as it found them, ſubject to the payment of divers compoſitions for tithes of their demeſne lands, made with particular rectors; who, conteſting their privilege even under that head, brought them to com-

Effect of the ſaid ſtatute.

Theſe ſheets will convince the intelligent reader that the univerſal deference yielded to the known learning and integrity of the members of this council cauſed its decrees in matters even of a ſecular nature, to be received as law, as well in *England* (where it ſtill continues ſo) as through the reſt of the *Chriſtian* world.

(1) The puniſhment of which offence is, that the party be out of the King's protection, attached by his body, and forfeit his lands, tenements, goods, and chattels. See ſtat. 15 *Rich.* II. chap. 5.

(2) 3 *B.* E. L. 382.

pound;

The diſſolution of abbies added a third reſtraint on the *Ciſtercians.*

pound; which two reſtraints were alſo followed by a third, at the time of the diſſolution; when as many of them as did not fall under ſtat. 31 *Hen.* VIII. chap. 13. loſt their exemption, there being no ſaving clauſe in the acts of their diſſolution, or ſurrender to preſerve or to ſecure them.

What lands are now diſcharged.

Upon the (2) whole; not all lands that belonged to the religious houſes in general are diſcharged from tithes, but only ſuch lands are capable of diſcharge, as belonged to the houſes which were diſſolved by

Stat. 31 *Hen.* VIII. chap. 13.

ſtat. 31 *Hen.* VIII. chap. 13. and not all thoſe lands, which belonged to the religious houſes diſſolved by that ſtatute, are diſcharged from tithes; but only ſuch of them as were diſcharged at the time of their diſſolution, but what ſhall be ſufficient

Evidence of ſuch diſcharge difficult to be made.

(3) evidence of ſuch diſcharge, and of the manner thereof that is, whether by order, bull, compoſition, or unity of poſſeſſion, at this diſtance of time, ſeemeth difficult to determine with preciſion; as ſtrictneſs of proof may be more or leſs requiſite, according to the particular circumſtances of the caſe.

Lay impropriator need not prove payment of tithes, in order to recover them.

It was long a queſtion, undetermined, whether a lay impropriator, as well as a clergyman, be intitled to recover tithes without proving payment; or whether a *non decimando* may be pleaded againſt a lay impropriator; but *Pengelly*, lord chief baron, delivered it

(3) See this ſtatute in our appendix, p.

(2) 3 *B.* E. L. 391, 392.

(3) See Archbiſhop of *York* & another and Sir *Miles Stapleton*, under *H.* 13 *Geo.* II. p. 387.

as his opinion, that a lay impropriator is under no neceſſity of proving payment of tithes to (1) him.

In what caſe vicar muſt prove tithes due to him.

But (2) if a vicar ſue for tithes, and the pariſhioner being a lay man denies that the ſaid tithes are due to him; in ſuch caſe, unleſs the vicar ſhall prove, that the tithes in queſtion are due to him by endowment or preſcription, he will (3) fail in his ſuit.

V. *Remedy for the Recovery of Tithes.*

Juriſdictions that have cognizance of tithes.

THE courts of juſtice that claim cognizance in the deciſions of ſuits inſtituted for tithes, ſeem reducible to the following juriſdictions, *viz.*

1. *The County Court.*
2. *The Eccleſiaſtical Court.*
3. *The Courts of* Chancery *and* Exchequer.
4. *Juſtices of Peace.*
5. *Appeal.*

1. *The County Court.*

Tithes anciently recoverable in the county court.

In the *Saxon* (4) times, tithes were recoverable in the county court, where the biſhop, or his deputy, and the ſheriff, did ſit as co-ordinate judges, there being

(1) *Benſon* and *Olive*, under *T.* 3 & 4 *Geo.* II. p. 319. Lady *Charlton* and Sir *Blundel Charlton*, *H.* 5 *Geo.* II. p. 337. Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo.* II. p. 370, 386.

(2) 3 *B.* E. L. 401.

(3) *Carte* and *Ball*, under *E.* 20 *Geo.* II. p. 418.

(4) 2 Inſt. 661. *Gr.* and *Rud.* of L. & E. 337.

at that time no ſeparate court of ordinary eccleſiaſtical juriſdiction.

2. *The Eccleſiaſtical Court.*

Subſtraction of tithes principal of pecuniary cauſes in this court.

The (1) principal of the pecuniary cauſes, cognizable in the Eccleſiaſtical courts is the ſubſtraction (2) or withholding of tithes from the parſon or vicar, whether the former be a clergyman or a lay appropriator (3); but herein a diſtinction muſt be taken; for the eccleſiaſtical courts have no juriſdiction to try the right of tithes, unleſs between ſpiritual (4) perſons; but in ordinary caſes, between ſpiritual men and laymen, are only to compel the payment of them, when the right is not diſputed; by the ſtatute, or rather writ of *circumſpectè* (5) *agatis*, it is declared, that the court chriſtian ſhall not be prohibited from holding plea, "*ſi rector* "*petat verſus parochianos oblationes et decimas debitas*

In what caſes it has no juriſdiction as to tithes.

Circumſpectè agatis,

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(1) 3 *Black.* Com. 88, 89.

(2) In caſe of ſubſtraction of tithes, a ſummary and expeditious aſſiſtance is given by ſtat. 27 *Hen.* VIII. chap. 20. and 32 *Hen.* VIII. chap. 7. which enacts, that upon complaint of any contempt or miſbehaviour to the eccleſiaſtical judge by the defendant in any ſuit for tithes, any priory counſeller or any two juſtices of the peace (or, in caſe of diſobedience to a definitive ſentence, any two juſtices of the peace) may commit the party to priſon without bail or mainprize, till he enters into a recognizance with ſufficient ſureties to give due obedience to the proceſs and ſentence of the court. 3 *Black.* Com. 102, 103. See *poſt*, 4. *Juſtices of Peace.*

(3) Stat. 32 *Hen.* VIII. chap. 7. which ſee at large in our Appendix, p. 1218.

(4) Where the diſpute is between rector and vicar, being both ſpiritual perſons, it ſeemeth that the proper cognizance of the cauſe belongeth to the eccleſiaſtical judge. 1 *B. E. L.* 75.

(5) Stat. 13 *Edw.* I. chap. 4. or rather, 9 *Edw.* II. 3 *Black.* Com. 88. n. See *Rayn.* Pref. to *Read*, on Stat. *Geo.* II. p. xii.

"*et conſuetas*;" ſo that if any diſpute ariſes, whether ſuch tithes be *due* and *accuſtomed*, this cannot be determined in the eccleſiaſtical courts, but before the King's court of common (1) law, as ſuch queſtion affects the temporal inheritance, and the determination muſt bind the real property; but where the *right* does not come in queſtion, but only the *fact*, whether or no the tithes allowed to be due are really ſubſtracted or withdrawn, this is a tranſient perſonal injury, for which the remedy may properly be had in the ſpiritual court, *viz.* the recovery of the tithes, or an equivalent.

2 & 3 *Edw.* VI. chap. 13. explained.

By ſtat. 2 & 3 *Edw.* VI. chap. (2) 13. it is enacted, that if any perſon ſhall carry off his *prædial* (3) tithes, before the tenth part is duly ſet forth, or agreement is made with the proprietor, or ſhall ſtop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; ſuch offender ſhall pay *double* the value of the tithes with coſts, to be recovered before the eccleſiaſtical judge, according to the King's eccleſiaſtical laws; by a former clauſe of the ſame ſtatute, the *treble* value of the tithes, ſo ſubſtracted or withheld, may be ſued for in the temporal courts, which is equivalent to the double value to be ſued for in the eccleſiaſtical; for one may ſue for and recover in the eccleſiaſtical courts, the tithes themſelves, or a recompence for them, by the ancient law, to which the ſuit for the

Might ſue in the eccleſiaſtical court for tithes by ancient law.

(1) It is ſaid, that all compoſitions for the endowments of vicarages ſhall be expounded by the judges of the common law; and if the ſpiritual court meddle with that matter, they are to be prohibited. *Watſ.* chap. 39.

(2) See this ſtatute at large in our Appendix, p. 1249.

(3) *Viz.* of corn, hay, or the like. 3 *Black.* Com. 88.

double

double value is ſuperadded by the ſtatute; but as no ſuit lay in the temporal courts for the ſubſtraction of tithes themſelves, therefore the ſtatute gave a *treble* forfeiture, if ſued for there, in order to make the courſe of juſtice uniform, by giving the ſame repation in one court as in the other

If Executor of parſon brings a bill for tithes, he need not offer to accept the ſingle value, he not being intitled by ſtat. 13 *Edw.* VI. chap. 13 to the treble value.

A man having brought (1) a bill for tithes, the defendant demurred, for that he had not offered by his bill to accept of the ſingle value, and yet had alledged in the bill, that the defendant had carried away the corn, *&c.* without ſetting forth the tithes according to the ſtatute; and it was inſiſted for the defendant, that if he ſhould be put to anſwer this bill, the plaintiff would preſently go to law, and give his anſwer in evidence, and recover the treble value of the tithes; and a court of equity ought not to aſſiſt a man in recovering a penalty, nor compel the diſcovery of a forfeiture.

Afterwards at another day upon a motion this demurrer was over-ruled, the plaintiff in this caſe being only the executor of a parſon, and not the parſon himſelf and ſo not intitled to a forfeiture upon the ſtatute. Anon. *M.* 34 *Car.* II. *A. D.* 1682.

3. *The Courts of* Chancery *and* Exchequer.

Tithes are now ſeldom ſued for in the eccleſiaſtical court, and the reaſon.

It now ſeldom (2) happens that tithes are ſued for at all in the ſpiritual court, for if the defendant pleads any cuſtom, *modus*, compoſition, or other matter whereby the right of tithing is called in queſtion, this takes it out of the juriſdiction of the ec-

(1) *Vern.* 60. pl. 57.

(2) 3 *Black.* Com. 89.

eccleſiaſtical

eccleſiaſtical judge; for the law will not ſuffer the exiſtence of ſuch a right to be decided by the ſentence of any ſingle, much leſs an eccleſiaſtical judge; without the verdict of a jury.

Notwithſtanding all (1) the ſtatutes, tithes (if of any conſiderable value) are now generally ſued for in the courts of (2) equity by *Engliſh* (3) bill, and

Suits for tithes generally in courts of equity.

(1) *Vin.* 13 *Edw.* I. ſt. 4. 9 *Edw.* II. ſt. 1. chap. 1. 18 *Edw.* III. ſt. 3. chap. 7. 1 *Rich.* II. chap. 13, 14. 27 *Hen.* VIII. chap. 20. 32 *Hen.* VIII. chap. 7. 2 & 3 *Edw.* VI. chap. 13.

(2) It was formerly doubted, whether a bill in equity to eſtabliſh a *modus* or cuſtomary manner of paying tithes, eſpecially if the cuſtom had not been found good at law; and ſometimes on demurrer to ſuch bills they have been diſmiſſed, [See *Toth.* 111, 112, 113.] but the conſtant practice now is to retain ſuch bill, and to decree on the pleadings, or to direct a particular point to be tried at law, concerning the reality of ſuch a cuſtom or the legality of it, Eq. Abr. 367. n. 9 *Vin.* Abr. 78, 79. n. And theſe courts of equity as incident to accounts, claim concurrent juriſdiction with every other court, of tithes and all queſtions relating thereto. 3 *Black.* Com. 437.

See Windham and *Norris*, 17 *Elix.* p. 1.
Moone and *Bond*, *T.* 34 *Elix.* p. 9.
Dean and Chapter of *Chriſt* Church and *Grant*, *T.* 11 *Jac.* I. p. 10.
Brown and *Whetſord*.
Gawle and *Lake*, 5 *Car.* I. p. 17.
Shires and *Burgoine*, *T.* 7 *Car.* II. p. 19.
Attorney General and *Steate*, *T.* 7 *Car.* II. p. 20.
Button and *Honey*, *T.* 10 *Car.* II. p. 26.
Driver and *Monk*, *E.* 13 *Car.* II. p. 32.
Stone and *Ludlow* & others, *H.* 14 & 15 *Car.* II. p. 35.
Buſh and *Riſbley*, *M.* 22 *Car.* II. p. 40.
Anon. *H.* 24 *Car.* II. p. 42.
Anon. *M.* 29 *Car.* II. p. 53.
Somerſet and *Fotherby*, *M.* 1 *Jac.* II. p. 65.
Buxton and *Hutchinſon*, *E.* 4 *Jac.* II. p. 67.
Carleton and *Brightwell*, *T.* 2 & 3 *Geo.* II. p. 250.

Bills to eſtabliſh a *modus decimandi* have been ſeveral times allowed, agreed by council and court; but bill being likewiſe to compel parſon to give receipts on payment of the *modus*, it was diſmiſſed at the rolls. *Wood* and *Farrington*, *M.* 11 *Geo.* II. 9 *Vin.* Abr. 78. marg.

(3) Court of *Chancery* will not diſmiſs bill for tithes; and leave plaintiff to ſpiritual court or the law, unleſs there be a good bar. *Douglaſs* and *Vane*, *H.* 19 *Geo.* II. p. 1124.

And commonly in the *Exchequer*.

for the moſt part in the (1) *Exchequer*, but not upon the ſtatute (2) for double or treble value (3).

Where *modus* controverted, in courts of equity, feigned iſſue directed.

Where (4) the exiſtence of a *modus* (5) *decimandi*, or real and immemorial compoſition, is controverted between the parties, to a ſuit in the (6) *Chancery* or (7) *Exchequer*, for tithes, a (8) feigned iſſue, is generally

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(1) *Lane*, 100. In this court bills for tithes are particularly attended to. By Lord Chancellor *Hardwicke*. *Chapman* and *Smith*, *E.* 27 & 28 *Geo.* II. p. 470. This court hath an original and complete juriſdiction over tithes; and hath uniformly exerciſed this paramount power; and even were the point problematical, the conſtant practice of the court, for ſo many centuries, would now warrant the exerciſe of ſuch immediate and abſolute juriſdiction; and a remark in regard to diſputing the juriſdiction of the *Exchequer*, in matter of tithe, fall with ſome ſeverity from the court in this caſe *Travis* and *Whitehead* & others, *T.* 17 *Geo.* III. p. 806.

(2) 2 & 3 *Edw.* VI. chap. 13. which ſtatute ſee at large in our Appendix, p. 1249.

(3) 3 *B. E. L.* 503.

(4) 3 *Black.* Com. 452.

(5) The court of *Exchequer* formerly ſent a *modus* to be tried on an iſſue, before they determined, whether it was good in point of law. *Mitchel* and *Neal*, *M.* 28 *Geo.* II. 2 *Ves.* 679. pl. 237. but not in every caſe, *Carte* and *Ball*, *E.* 20 *Geo.* II. *Id.* marg. 3 *Tr. Ath.* 498. But the preſent practice of that court, as to a *modus*, is, if it can poſſibly be ſupported, the court will attend to the evidence, and ſee that it is ſtrongly proved, and not ſend it to trial. *Mitchel* and *Neal*, *M.* 28 *Geo.* II. *Richards* and *Evans*, *M.* 20 *Geo.* II. *Chapman* and *Smith*, *T.* 27 *Geo.* II. 2 *Ves.* 679. pl. 237. and marg. The rankneſs of a *modus* is a queſtion of fact, not of law. *Pyke* and *Dowling*, *H.* 19 *Geo.* III. p. 942.

(6) If a point of mere law ariſes in the courſe of a cauſe, it is the practice of the court of *Chancery* to refer it to the court of King's Bench, or Common Pleas, upon a caſe ſtated for that purpoſe, *Imp.* New Inſtruct. Cler. 492. 3 *Black.* Com. 378. *Pyke* and *Dowling*, *H.* 19 *Geo.* III. p. 942.

(7) See *Fox* and *Rutty*, under *M.* 8 *Geo.* I. p. 259. *Peacock* and *Tiemerſh*, under *H.* 8 *Geo.* I. p. 162, 163. Dr. *Bennet* and *Treppaſs* & others under *H.* 9 *Geo.* I. p. 281. *Gwoves* and *Kelynack* & others, under *T.* 1 *Geo.* II. p. 240.

(8) *Horton* and *Harrington* & others, *T.* 1 *An.* p. 95. *Buſh* and *Riſbley*, *M.* 22 *Car.* II. p. 42. Earl of *Scarborough* and *Hunter*, *E.* 6 *Geo.* I. p. 346.

nerally (1) directed by thoſe courts of equity; they being ſo ſenſible of the deficiency of trial by written depoſitions, that they will not bind the parties by their decree, till after the matter hath been verified to them, by the verdict of twelve jurors, in order to ſatisfy the (2) conſcience of the above *prætorian* judges.

There being no vicarages at common (3) law, no tithes or profits of any kind can *de jure* belong to the vicar, but by (4) endowment or preſcription; the former is (5) confeſſedly the principal ground of a vicar's right to tithes; but as (6) endowments are ancient, and therefore few of the originals can be

Vicar is intitled to tithes only by endowment or preſcription.

Preſcription where endowment is loſt.

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p. 146. *Fox* and *Rutty, M.* 8 *Geo.* I. p. 159. *Taylor* and *Walker, E.* 3 *Geo.* II. p. 286. *Webb* and *Gifford, T.* 4 & 5 *Geo.* II. p. 322, 330. *E.* 9 *Geo.* II. p. 347. *Benſon* and *Olive, M.* 5 *Geo.* II. p. 335. *Gibb* and *Goodman* & others, *T.* 6 & 7 *Geo.* II. p. 339.

(1) As no jury can be ſummoned to attend the *Chancery* [3 *Black* Com. 452.] even on the *law* ſide of the court [3 *Black.* Com. 48.] (the petty bag offices) if the parties deſcend to iſſue, the Lord Chancellor, or Keeper, delivers the record with his proper hands into the King's Bench or Common Pleas, to be tried there. 1 *Rep.* 157. *Robert Parning*, Lord Chancellor to *Edward* the *Third*, delivered with his own hands a record into the court of King's Bench, 17 *Edw.* III. in which year he died ſitting and arguing [2 *Inſt.* 552. 4 *Inſt.* 79, 99.] in the court of Common Pleas, amongſt the juſtices there, as is recorded in the year books of that year. See *Hil.* 17 *Edw.* III. fol. 11, 2. 14. b. *Eaſt.* 17 *Edw.* III. fol. 23. b. pl. 9. *Trin.* 37. b. pl. 10 *Spelm.* Gloſſ. 211. The court of *Exchequer* ſend the fact to be tried on the law ſide of their court (the office of pleas, *Lane*, 100.)

(2) *Taylor* and *Walker, E.* 3 *Geo.* II. p. 286. *Chaplin* and *Bree, H.* 25 *Geo* III. p. 657.

(3) *Gibſ.* 719. 1 *B.* E. L. 73.

(4) *Ante*, xxiv. xxvii.

(5) *Sims* and *Bennet, M.* 3 *Geo.* III. p. 513.

(6) *Ante*, xxiv. xxvii.

produced, the loſs of them is ſupplied by (1) preſcription, that is, if the vicar can prove, that he has enjoyed this or that particular ſmall tithe by conſtant uſage, the law will preſume, that he was legally endowed with it; and in conſequence of ſuch preſumption, courts of juſtice (2) admit ſuch uſage, as evidence of the original endowment.

Evidence.

Seeming miſtakes of doctors *Gibſon* and *Burn* pointed out.

So that the Drs. (3) *Gibſon* and (4) *Burn* ſeem both miſtaken, the former in ſaying, that an endowment cannot be preſumed, but muſt be ſhown on the part of the vicar, and the latter in (5) adopting the doctrine of the former; and this is not all, for they both (6) ſeem to contradict themſelves.

Authority of Endowments.

Original endowments of the vicar (7) are of ſuch authority, that they cannot be preſcribed againſt by the parſon; nor can any time deſtroy them; and ſuch cauſes between parſon and vicar, as relate to them, or depend on them, are alſo cognizable in the ſpiritual court, and (8) it has been alſo adjudg-

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(1) 1 *B.* E. L. 75. *Gibſ.* 720. Corporation of *Bury* & another and *Evans*, *E.* 12 *Geo.* II. p. 383.

(2) *Ante*, xxiv.

(3) *Gibſ.* 719.

(4) 1 *B.* E. L. 73.

(5) And as the premiſes ſeem untrue, the reaſon, why the payment of tithe to the parſon is *primâ facie* a diſcharge againſt the vicar, may be doubted. See *Gibſ.* 719. 1 *B.* E. L. 73.

(6) See 1 *B.* E. L. 73, 75. *Gibſ.* 719, 720.

(7) 1 *B.* E. L. 73. *Gibſ.* 720.

(8) *Gibſ.* 720. 1 *B.* E. L. 74, 75.

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ed, that if a vicar has uſed time out of mind, or for a long time, to take particular tithes or profits, he ſhall not loſe them, becauſe the original endowment is produced and they are not there.

For theſe reaſons it were to be wiſhed, ſays Dr. *(1) Gibſon*, that diligent (2) ſearch was made after the original (3) endowments of vicars in the eccleſiaſtical offices, and other (4) repoſitories of records; in order

Search after original endowments recommended by *Gibſon* and *Burn*.

(1) *Gibſ.* 720.

(2) A very learned gentleman (Dr. *Ducarel*) has generouſly undertaken the execution of the above-ſaid ſearch; hoping that all who may have it in their power, in any wiſe to contribute towards the completion thereof, will communicate to him, what may have come to their knowledge with reſpect to any of the particulars.

A liſt of theſe endowments would certainly be a very uſeful directory to multitudes of perſons, who elſe would never know where to ſeek for them; and may ſave both trouble and expence to thoſe who deſire to conſult them; and even in caſes where no endowments are to be found, preventing a fruitleſs ſearch, will be doing ſome good. 1 *B.* E. L. 74. n.

(3) The principal evidence in cauſes by vicars for tithes are old endowments, for a vicar may demand what his vicarage was endowed with, and he cannot demand more, unleſs immemorial uſage gives ground for a juſt preſumption, that there was a further endowment, though not now extant; therefore diſcoveries of endowments will tend, not only to the right determination of law-ſuits, which for the want of being able to come at the proper evidences of them in cauſes, there is great danger of their being decided the wrong way; but theſe diſcoveries will tend alſo towards the prevention of litigation, by ſhewing both parties, to what they are intitled; and thus will be of common benefit to the clergy, to impropriators, and to the reſt of the laity. 1 *B.* E. L. 74. n.

(4) Dr. *Ducarel*'s "Propoſal for publiſhing a general Repertory of the Endowments of Vicarages," is intended for the ſervice both of vicars and their pariſhioners; the doctor has proceeded ſo far in his plan as to have ſet down a liſt of above two hundred endowments of vicarages in alphabetical order, the name with the date of every endowment in the regiſters of the ſee of *Canterbury*, and all ſuch as he has been able to diſcover in the *Lambeth*, *Cotton*, *Harleian*, and other libraries, or in printed books; as well with re-

order to bring to light (1) as many of them as can possibly be found.

Courts (2) of equity do frequently determine upon the interpretation; and any words in an endowment being doubtful, shall be interpreted by practice, and to the advantage of the vicar; so in the case of (3) *Barkſdale* and *Smith*, though (4) *garba* in the common acceptation relates to corn, yet it appearing

Barkſdale and *Smith*.

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ferences to the *manuſcripts* in which they are contained, as an account, which of them have been printed and in what works.

A ſpecimen of the plan propoſed follows:

ACLEY (LINC. *Diæc.*) *Vicar. de* ——— *ordinatio* vicariæ eccleſiæ parochialis de ACLEIA LINC. *Diæc. Dat.* OXON. *in Feſto S.* MICHAELIS A. D. 1343. (Printed in *Kennet's* Parochial Antiquities, pag. 455. *Ex Chartul. S. Frideſwidæ Æd. Ch.* OXON.)

ALBOLDESLEY (LINC. *Diæc.*) *Vicar. de* ——— *ordinatio vicariæ*, A. D. 1361. *Regiſt.* JOHAN. GYNEWELL *Epiſc.* LINCOLN. fol. 367, *&c.*

1 *B.* E. L. 75. n.

(1) The moſt likely places to find original endowments in, are the regiſters of the biſhops or dean and chapter of the dioceſe, [See *Bateman* and *Aiſtrup* & others, *E.* 14 *Geo.* III. p. 701, 703.] but partly by means of national changes and confuſions that have happened; partly through the unfaithfulneſs or negligence of officers, and partly through other accidents; many of the books belonging to theſe regiſtries are loſt from thence; and not a few of them, and likewiſe of the chartularies and legen books of diſſolved religious houſes, in which they are recorded, amongſt other things, the endowments of their vicarages, are now in various libraries and repoſitories, public and private. 1 *B.* E. L. 74. n.

(2) 1 *B.* E. L. 76.

(3) Dr. *Burn* refers to *Gibſ.* 719, 720. but I can find no ſuch caſe in either of theſe references.

(4) See *Sims* and *Bennet*, *M.* 3 *Geo.* III. p. 512, 513, 516, 518. *Bateman* and *Aiſtrup*, *E.* 14 *Geo.* III. p. 696. Lord *Brownlow* and *Devis*, *T.* 22 *Geo.* III. p. 1016, 1074.

that

that the cuſtom had been for the vicar to have tithe hay, this was adjudged ſufficient to extend it to tithe hay; and the ſame thing was adjudged in the caſe of tithe wood, as given by the term (1) *altaragia*, upon the ſame foundation, in the caſe of (2) *Reynolds* and *Green*; or if given there under the name *minutæ decimæ*, cuſtom changes a great tithe, as wood is, into ſmall; upon the occaſion of which caſe, it was ſaid, that the word (1) *altaragium* ſhould be expounded according to uſe; and Biſhop *Stillingfleet* obſerved, that in the ſettlement of the altarage of *Cockrington* by *Groſthead* Biſhop of *Lincoln*, not only oblations and obventions, but the tithes of wool and lamb, were comprehended under that name.

Tithe hay a ſmall tithe by cuſtom.

Altaragia.

Reynolds and *Green.*

Cuſtom changes great tithes into ſmall.

For more reſpecting ſuits for the recovery of tithes in courts of equity.

See Amendment,
Appeal,
Anſwer,
Bill,
Chancery,
Demurrer,
Depoſitions,
Endowments,
Evidence,
Exchequer,
Juriſdiction,
Iſſue,
Title,
Witneſſes,
And other proper references in our Index.

(1) *Franklyn* and *Saint Croſs*, *T.* 8 *Geo.* I. *p.* 158. *Bateman* and *Aſtrop* & others, *E.* 14 *Geo.* III. *p.* 695. n.

(2) Dr. *Burn* refers to *Gibſ.* 719. 720, but I cannot find any ſuch caſe in either of theſe references.

Parſon's book good evidence of a *modus*.

Where (1) a parſon's book is produced to prove a *modus*, and the parſon long dead, a witneſs who has examined the pariſh books, in which is the ſame parſon's name, may be permitted to ſwear to the ſimilitude of the hand writing, for it is the beſt evidence in the nature of the thing, in a caſe, where the antiquity of the writing makes it impoſſible for any living witneſs to ſwear he ever ſaw the party write; and the pariſh books are not in a party's power to produce.

Of pleading a preſcription for cattle *levant* and *couchant*.

If a man preſcribe for a certain number of cattle, it is not neceſſary to ſhew, they were *levant* and *couchant*, becauſe it is no prejudice to the owner of the ſoil, the number being aſcertained; but if the preſcription be for a number uncertain, they muſt be *levant* and *couchant* (2); but a preſcription for all cattle *levant* and (3) *couchant* will be good, and need not be for all his cattle; for *levancy* and *couchancy* are a ſufficient aſcertaining what cattle may be put in, for no more ſhall be ſaid to be *levant* and *couchant* than the land is ſufficient to maintain; and if the plaintiff were guilty of any fraud, as to that, the defendant may take advantage of it in pleading.

Where the Pope's bull is evidence of a diſcharge.

A Pope's (4) bull is evidence upon a ſpecial preſcription to be diſcharged of tithe; whereupon need only ſay, that the lands belonged to ſuch a monaſtery, and were diſcharged at the time of the diſſolution, for

(1) *Bul. Ni. Pri.* 236.

(2) *Bul. Ni. Pri.* 59.

(3) *Harding* and *Johnſon, M.* 20 *Geo.* II. *Bul. Ni. Pri.* 59.

(4) *Bul. Ni. Pri.* 248.

then

then they continue discharged by the (1) act of parliament; but it is no evidence on a general prescription to be discharged, because that would shew the commencement of such a custom, and a general prescription is that there was no time or memory of things to the contrary.

Hearsay admitted evidence of a prescription.

In (2) questions of prescriptions, it is allowable to give hearsay evidence, in order to prove general reputation.

Form of a Bill for Tithes in the Court of *Exchequer*.

The direction.

To the Right Honourable WILLIAM PITT, *Esquire, Chancellor, and Under Treasurer of of his Majesty's Court of* EXCHEQUER, *at* WESTMINSTER; *the Right Honourable Sir* JOHN SKYNNER, *Knight, Lord Chief Baron of the said Court, and the rest of the Barons there.*

Introduction.

HUMBLY complaining sheweth unto your honours, your orator *James Elers*, of *Horncastle* in the county of *Essex*, Esquire, debtor and accountant to his Majesty, as by the records of this honourable court, and otherwise, it doth and may appear, that your orator now is and for six years last past hath been seised in fee, as proprietor and owner of all and every the tithes of corn and grain and other great and predial tithes whatsoever arising, renewing, increasing and growing, within the town-

The premises by way of recital.

(1) Stat. 31 *Hen.* VIII. chap. 13.

(2) *Bul. Ni. Pri.* 295.

ships,

ſhips, hamlets, and vills of *W.* and *A.* and the titheable parts thereof in the pariſh of *B.* and parcel of the impropriate rectory thereof, in the ſaid county of *Eſſex*; *and particularly of the tithes of corn and grain, and other great and predial tithes ariſing, renewing, increaſing and growing in, upon and within the tenement called* B. *in* A. *and* W. *aforeſaid, or one of them, and by reaſon* thereof during all the time aforeſaid, was and now is juſtly, rightfully and lawfully intitled unto, and ought to have enjoyed, had, and received, and ought to have, enjoy and receive, all and every the tithes of corn, grain, and other great and predial tithes ariſing, renewing, increaſing or growing, or which, during the ſaid time have ariſen, renewed, increaſed or grown within the ſaid townſhips, hamlets and vills of *W.* and *A.* and either of them, and particularly in, upon and within the ſaid tenement called *B.* and alſo all and every the ſame matters and things whatſoever, which during the ſaid time, of right or by any cuſtom within the ſaid townſhips, hamlets or vills, have been payable, as for or on account of tithe corn, grain, or other great and predial tithes, or which ought to have been ſo payed or anſwered. And your orator further ſheweth to your honours, that *M. B.* widow, and *B.* her ſon, jointly and ſeverally, for and during the ſaid ſpace of ſix years laſt paſt, had held, or occupied and enjoyed the ſaid tenement called *B.* within *A.* and *W.* aforeſaid, or one of them, or the lands and grounds thereunto belonging, and other lands and grounds within *A.* and *W.* aforeſaid, or one of them, or the titheable places thereof in and upon the ſame, and within the ſaid townſhips, hamlets and vills, or one of them, and the titheable places thereof, and had jointly and ſeverally growing, renewing, increaſing, and thence reaped, and had, and took in the ſaid

years

years reſpectively ſeveral quantities of corn and grain, to wit, in each of the ſaid years one hundred ſhocks or hattocks of wheat, the tithe whereof in each year, if duly paid, would have been worth twenty ſhillings, one hundred ſhocks or hattocks of rye, the tithe whereof was worth in each year other twenty ſhillings; three hundred hattocks of ſhocks of oats, the tithe whereof would have been worth in each of the ſaid years, if paid, thirty ſhillings; one hundred and fifty ſhocks or hattocks of barley, the tithe whereof, if the ſame had been duly anſwered, would have been worth other thirty ſhillings; one hundred ſhocks or heaps of beans, the tithe whereof was worth fifteen ſhillings; one hundred ſhocks or heaps of peaſe, the tithe whereof was worth other fifteen ſhillings; two hundred ſhocks or hattocks of bigg, the tithe whereof was worth thirty ſhillings, and upwards. All which ſaid ſeveral tithes became due and payable from the ſaid *M. B.* and *B.* her ſon, jointly or ſeverally, in each of the ſaid years, and ought to have been juſtly and duly paid and anſwered unto your orator as proprietor and owner of the ſaid tithes and premiſes. *But ſo it is*, may it pleaſe your honours, that the ſaid *M. B.* and *B.* having entered into a combination and confederacy between themſelves, and with ſeveral other perſons unknown to your orator, who when they ſhall be diſcovered, your orator prays may be made parties hereto, with apt words to charge them, have and either of them hath neglected, omitted, and refuſed to ſet out, pay, ſatisfy, or anſwer, and have not, nor hath either of them, in any of the ſaid years, ſet out, paid, ſatisfied, or anſwered unto your ſaid orator the ſaid ſeveral and reſpective tithes, or any of them, or made any agreement, compoſition, or juſt ſatisfaction to your ſaid orator for the ſame, or any

The allegations or ſuggeſtions.

any thing in lieu thereof, but though in a friendly manner requeſted thereto, have and hath jointly and ſeverally refuſed to ſet out the ſame, or to pay or anſwer what is juſtly due to your orator on thoſe accounts, or fairly or juſtly to ſet forth, yield, or pay their or either of their ſaid tithe, or to pay and make him any juſt ſatisfaction for the ſame, or for any the tithes ſubſtracted and with-held by them or either of them; but as they have concealed, ſo they do, and each of them doth endeavour to conceal the ſaid titheable matters, and refuſe to diſcover what lands, tenements, and hereditaments in particular they jointly and ſeverally held, occupied, plowed and reaped within the ſaid townſhips, hamlets and villages in each of the ſaid years, nor what tithes of corn and grain they in each of the ſaid years, or either of them reſpectively, with-held and detained from your orator, nor what is and was the value thereof; and as their reaſon for ſo doing, the ſaid confederates ſometimes inſiſt, that they have duly paid and anſwered to your orator the tithes of all and ſingular the titheable matters, and at other times that they are not, nor were liable to the payment of any tithe in kind, but exempt and free from the payment thereof *under an antient* modus *or compoſition of ten ſhillings yearly, or other the like ſum payable time immemorial, in lieu of tithes of corn and grain, and other great and predial tithes ariſing, renewing, increaſing and growing upon and within the ſaid tenement and lands held, enjoyed, ſown and reaped by them in the ſaid ſeveral years aforeſaid; which* modus *they pretend was paid by them in and for the ſaid ſeveral years unto your orator*; whereas your orator charges, as the truth is, that the ſaid confederates, or either of them, did not ſet forth, pay, or anſwer the tithes due to your orator for the corn and grain reaped, had and taken by them,

which grew upon the ſaid tenement, lands and premiſes, or any of them, in or for any the ſaid years herein before mentioned, nor have they or either of them paid or anſwered any *modus*, pretended *modus*, or compoſition to your orator for the ſame, for any of the ſaid years; and the truth is, as your orator charges it to be, that tithes of corn and grain, and other great and predial tithes ariſing from the premiſes, are due and payable, and ought to be anſwered and paid unto your orator in kind; and the ſaid confederates are not nor ought to be exempt from the payment thereof, upon any pretence of a *modus* payable in money, as in lieu thereof, which however was never paid to your orator; *and if there was any colour to ſet up ſuch pretences to a* modus, *yet that is owing to a late agreement, whilſt the tithes, as alſo the ſaid tenement and lands, were in the hands of the family of the* M.'*s and not any preſcriptive* modus, *nor was the ſaid tenement antiently diſcharged from payment of tithes in kind, upon or under payment of any* modus *or ſum of money in lieu of tithes; but tithes in kind were paid and anſwered as for other the lands or tenements within the ſaid townſhips, till the ſaid tenement and tithes both came into the hands, ownerſhip or poſſeſſion of* M. *of H. in the ſaid county, who ſettled and conveyed the ſaid tithes upon or unto one of his younger ſons, from whom the ſame deſcended and came to* R. M. *Eſq; his kinſman, of whom your orator purchaſed the ſame; and the ſaid tenement called* B. *continuing in the ownerſhip of ſome other of the* M.'*s near relations to the then proprietors of the ſaid tithes, they on account of kindred or other motives agreed to accept ten ſhillings* per annum, *or other ſuch ſum in money for the tithes ariſing from the ſaid tenement, which being a temporary agreement only, and not any* modus *that had been paid time immemorial, your orator humbly apprehends himſelf not to be bound or obliged thereby, nor ought*

ought the ſaid confederates, nor either of them, who, or one of them, purchaſed the ſaid tenement, or claim under ſome purchaſer thereof, or have or hath poſſeſſed the ſame during the time aforeſaid, to have or claim any diſcharge or exemption from payment of tithes in kind, as upon or under any ſuch pretences, they, or one of them, well knowing or having been informed, or from the papers, books, notes, and memorandums in their keeping or power, may be well ſatisfied that there was anciently no ſuch modus *paid or received in diſcharge of tithes ariſing from the ſaid tenement; but that which was paid and received as on account thereof was modern and under late agreement and compliance whilſt the ſaid tenements and tithes were both in the hands of the family of the* M.'s; *and the ſaid* confederates ought of right and juſtice to have anſwered and paid unto your orator their ſaid ſeveral tithes for the ſaid titheable matters ariſing and growing in and upon the ſaid tenement, and within the ſaid townſhips, vills and hamlets as aforeſaid; yet the ſaid confederates and each of them, under ſome and the like frivolous and unjuſt pretences as aforeſaid, have refuſed, and do refuſe to pay or anſwer the ſaid tithes or any of them to your ſaid orator, or to make him any juſt ſatisfaction for the ſame, or to make him any full and fair diſcovery of the titheable matters they ſeverally had within the ſaid townſhips, hamlets and vills and titheable places thereof, in the ſaid ſeveral years, or any of them, though they have been ſeverally requeſted thereto. ALL WHICH ACTINGS, doings, pretences and deſigns of the ſaid confederates are contrary to equity and good conſcience, and tend to your orator's great wrong and injury: *In tender conſideration whereof*, and for that your orator cannot exactly prove the ſeveral natures, kinds and quantities of the ſaid titheable matters, nor what the ſaid tithes due from them and each

The complaint of the fraud.

The clauſe that gives cognisance in equity.

each of them unto your orator did or might in each of the ſaid years amount unto, but the ſame being induſtriouſly concealed by the ſaid confederates, remain principally in their knowledge; from whence and the evidence your orator may give, he your ſaid orator well hopes he ſhall be enabled to make out his charge againſt the ſaid confederates, whereupon to be relieved and to obtain ſatisfaction for the ſingle value of the ſaid tithes ſubſtracted and with-held as aforeſaid, and to have ſuch other relief and ſatisfaction as may appear juſt: *To that end therefore*, and in order thereto, that the ſaid confederates may, upon their ſeveral corporal oaths, true, perfect and diſtinct anſwer make to all and ſingular the premiſes, and more eſpecially that they and either of them may diſcover and ſet forth what particular lands, tenements, grounds and hereditaments they jointly and ſeverally had during the ſaid ſix years, or any and what part thereof held, occupied or enjoyed within the ſaid townſhips, hamlets and vills, and each of them, and ſet forth what parts thereof were in each of the ſaid years ſown with corn and grain, and the prices, kinds and values thereof in each year diſtinctly, and what corn they jointly and ſeverally reaped, had, cut, or took within the ſaid townſhips, hamlets and vills, and in what years diſtinctly of the ſaid ſix years, and what was and were the full value of the tithe thereof in each of the ſaid years diſtinctly, if the ſame had been paid in kind; and whether your orator, or ſome, and who, on his behalf, did not, at ſome, and what time and times, apply to them, or one, and which of them, to ſet out or anſwer their, or one, and which of their ſaid tithes, and ſhew cauſe, if they can, why they refuſed ſo to do; and whether they have not ſeverally neglected or refuſed to pay or anſwer the ſame, or

The interrogating part.

to give any ſatisfaction or make any compoſition or recompence to your orator for or in lieu of the tithes, and what were the ſeveral tithes of corn and grain grown, reaped, and had by them, and either of them, within the ſaid townſhips, hamlets and vills, worth, if the ſame had been juſtly paid and anſwered in each of the ſaid ſix years; *and if they, or either of them, ſhall ſet up or pretend to any* modus *or compoſition, as for, or in lieu of the ſaid tithes, or any of them, that they may ſhew whether they have paid or tendered the ſame in any and what years, and when, where, and to whom, and for what years the ſame is in arrear and unpaid, and what ſuch* modus *is in particular, and to what lands, tenements and grounds the ſame extends, and which is covered or pretended to be covered thereby, and which not, and when ſuch* modus *or compoſition commenced, and by and under what agreement, and when and with whom made, and whether, as they* ſeverally have heard and believe, the tithes of corn and grain growing and ariſing from the ſaid tenement, lands and premiſes, or ſome, and which of them, were not paid, and what in kind; and *whether the ten ſhillings, or other ſum of money pretended to be paid or payable as a* modus *or compoſition for or in lieu of great tithes ariſing from the ſaid tenement and premiſes, was not by or under ſome, and what agreement or compliance whilſt the ſaid tithes and tenements were in the hands of ſome of the family of the* M.*'s: and whether the ſame was made perpetual or only temporary and during what time ſuch* modus *or compoſition was paid and accepted, and by whom and when*; and that they may make diligent ſearch amongſt all the books, papers, notes and memorandums in their or either of their cuſtody or power, and ſet forth what they know, have heard, or can find relating to the ſaid pretended *modus* or payment of tithes in the very words and figures, and ſhew cauſe, if they can, why

why they have ſeverally refuſed or neglected to ſet forth, and pay, and anſwer their and either of their tithes to your orator, or to make him any recompence, compenſation or ſatisfaction for the ſame, or for the value, or in lieu thereof; and that the ſaid confederates may, upon a full and juſt diſcovery of the premiſes, be decreed and obliged to pay, ſatisfy, and anſwer, unto your orator, all and every the tithes ſubſtracted by them, and either of them, or the juſt value thereof, as in every of the ſaid years, became juſtly due and payable from them, and either of them reſpectively, unto your ſaid orator, not deſiring to take advantage of the forfeiture of the treble value, but well contenting himſelf with the ſingle value of the ſaid tithes ſubſtracted, with-held, and not paid; and if any *modus* ſhall be ſet up and ſupported, that they may ſhew in particular to what lands and grounds the ſame extends, and why they have not paid and anſwered the ſame, and may be decreed to make payment thereof, and of the arrears. And that your orator may upon a full and fair diſcovery of all and every the matters and things aforeſaid, and of the circumſtances and particulars relating thereto, upon the oath of the ſaid confederates, be otherwiſe relieved in all and ſingular the premiſes, according to equity and good conſcience. May it pleaſe your honours, to grant unto your orator, his Majeſty's moſt gracious writ of *ſubpœna*, to be directed to the ſaid *M. B.* and *B.* her ſon, thereby commanding them, and each of them, at a certain day, and under a certain pain, therein to be limited, perſonally to be and appear before your honours, in this honourable court, and then and there, true, direct, and perfect anſwer make to all and ſingular the premiſes, and further to ſtand to, perform, and abide ſuch other order, direction, and decree therein, as to your ho-

The prayer of the bill.

The concluſion.

nours ſhall ſeem meet, and your orator ſhall ever pray, &c.

JOHN HOLT.

For the form of a bill of coſts in this court, on the part of the parſon, in a ſuit for tithes; ſee the cauſe of Bateman *and* Aiſtrup & *others, under* E. 14 Geo. III. *p.* 708.

4. *Juſtices of the Peace.*

Juriſdiction of juſtices of peace, as to tithes.

THE juriſdiction of juſtices of peace, as to tithes, ſeems reducible to the following particulars:

1. *As to Small Tithes in general.*
2. *As to Great and Small Tithes and other Church Dues from* QUAKERS *only.*

and

3. *As to Contempts of* Meſne (1) *and other Proceſs for Tithes in the Eccleſiaſtical Court.*

And

1. *As to Small Tithes in general.*

7 & 8 *Wil.* III. Chap. 6.

(2) *An Act for the more eaſy Recovery of Small Tithes.*

Recovery of ſmall tithes in general, not amounting to above the value of 40*s.*

Sect. 1. "FOR the more eaſy and effectual recovery of ſmall tithes, and the value of them, where the ſame ſhall be unduly ſubſtracted and detained, where the ſame do not amount to above

(1) *Meſne* proceſs ſignifies all ſuch proceſs, as intervenes between the commencement and end of a ſuit. 3 *Black.* Com. 279, 415.

(2) Perpetuated by ſtat. 2 *Geo.* I. ſtat. chap. 6.

the

the yearly value of forty ſhillings from any one perſon; be it enacted by the Kings moſt excellent Majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons in this preſent parliament aſſembled, and by the authority of the ſame, that all and every perſon and perſons ſhall henceforth well and truly ſet out and pay all and ſingular the tithes, commonly called ſmall tithes, and compoſitions and agreements for the ſame, with all offerings, oblations, and obventions, to the ſeveral rectors, vicars and other perſons to whom they are or ſhall be due, in their ſeveral pariſhes within this kingdom of *England*, and dominion of *Wales*, and town of *Berwick* upon *Tweed*, according to the rights, cuſtoms and preſcriptions commonly uſed within the ſaid pariſhes reſpectively; And if any perſon or perſons ſhall hereafter ſubſtract or withdraw, or any ways fail in the true payment of ſuch ſmall tithes, offerings, oblations, obventions or compoſitions, as aforeſaid, by the ſpace of twenty days at moſt after demand thereof, then it ſhall and may be lawful for the perſon or perſons, to whom the ſame ſhall be due, to make his or their complaint in writing unto two or more of his Majeſty's juſtices of the peace within that county, riding, city, town-corporate, place or diviſion, where the ſame ſhall grow due (neither of which juſtices of peace is to be patron of the church or chapel whence the ſaid tithes do or ſhall ariſe, nor any ways intereſted in ſuch tithes, offerings, oblations, obventions or compoſition aforeſaid).

S. 2. "And be it further enacted, by the authority aforeſaid, that if hereafter any ſuit or complaint ſhall be brought to two or more juſtices of the peace, as aforeſaid, concerning ſmall tithes, offerings, oblations, obventions or compoſitions, as

aforeſaid, the ſaid juſtices are hereby authorized and
Summons. required to ſummon in writing, under their hands and ſeals by reaſonable warning, every ſuch perſon or perſons againſt whom any complaint ſhall be made, as aforeſaid; and after his or their appearance, or upon default of their appearance, the ſaid warning or ſummons being proved before them upon oath, the ſaid juſtices of peace, or any two or more of
Hearing. them, ſhall, proceed to hear and determine the ſaid complaint, and upon the proofs, evidences and teſtimonies produced before them, ſhall, in writing
Adjudication. under their hands and ſeals, adjudge the caſe, and give ſuch reaſonable allowance and compenſation for ſuch tithes, oblations, and compoſitions ſo ſubſtracted or with-held, as they ſhall judge to be juſt and rea-
Coſts. ſonable, and alſo ſuch coſts and charges not exceeding ten ſhillings, as upon the merits of the cauſe ſhall appear juſt.

S. 3. "And be it further enacted, that if any perſon or perſons ſhall refuſe or neglect, by the ſpace of ten days after notice given, to pay or ſatisfy any ſuch ſum of money, as, upon ſuch complaint and proceeding, ſhall by two or more juſtices of the peace be adjudged, as aforeſaid, in every ſuch caſe, the conſtables and churchwardens of the ſaid pariſh, or one of them, ſhall, by warrant under the hands
Diſtreſs. and ſeals of the ſaid juſtices to them directed, diſtrain the goods and chattels of the party ſo refuſing or neglecting, as aforeſaid, and after detaining them by the ſpace of three (1) days, in caſe the ſaid ſum ſo adjudged to be paid, together with reaſonable charges for making and detaining the ſaid diſtreſs, be not tendered or paid by the ſaid party in the mean

(1) See p. xcii.

time,

time, ſhall and may make public ſale of the ſame, and pay to the party complaining ſo much of the money ariſing by ſuch ſale, as may ſatisfy the ſaid ſum ſo adjudged, retaining to themſelves ſuch reaſonable charges, for making and keeping the ſaid diſtreſs, as the ſaid juſtices ſhall think fit, and ſhall render the overplus (if any be) to the owner. Sale.

S. 4. "Provided always, and be it enacted, that it ſhall and may be lawful for all juſtices of peace, in the examination of all matters offered to them by this act, to adminiſter an oath or oaths, to any witneſs or witneſſes, where the ſame ſhall be neceſſary for their information, and for the better diſcovery of the truth. Oath may be adminiſtered.

S. 5. "Provided alſo, and be it enacted, that this act, or any thing herein contained, ſhall not extend to any tithes, oblations, payments, or obventions within the city of *London* or liberties thereof, nor to any other city or town corporate where the ſame are ſettled by any act of parliament, in that caſe particularly made and provided. Act not to extend to *London*, &c.

S. 6. "Provided alſo, and be it enacted, that no complaint for, or concerning any ſmall tithes, offerings, oblations, obventions or compoſitions hereafter due, ſhall be heard and determined by any juſtices of the peace, by virtue of this act, unleſs the complaint ſhall be made within the ſpace of two years next after the times that the ſame tithes, oblations, obventions and compoſitions did become due or payable, any thing in this act contained to the contrary notwithſtanding. Complaint to be made within two years.

S. 7. "Provided alſo and be it enacted, that any perſon finding him, her, or themſelves agrieved, by any Appeal.

any ſuch judgment or judgments ſhall be had, as aforeſaid, ſhall remove out of the county, riding, city or corporation, after judgment had, as aforeſaid, and before the levying the ſum or ſums thereby adjudged to be levied, the juſtices of the peace who made the ſaid judgment, or one of them, ſhall certify the ſame, under his or their hands and ſeals, to any juſtice of peace of ſuch other county, city or place wherein the ſaid perſon or perſons ſhall be inhabitants; which ſaid juſtice is hereby authorized and required, by warrant under his hand and ſeal, to be directed to the conſtables or church-wardens of the place, or one of them, to levy the ſum or ſums ſo adjudged to be levied, as aforeſaid, upon the goods and chattles of ſuch perſon or perſons, as fully as the ſaid other juſtices might have done, if he, ſhe, or they had not removed, as aforeſaid, which ſhall be paid according to the ſaid judgment.

S. 11. "Provided always and be it enacted, that no vicar or other perſon ſhall have remedy to recover ſmall tithes, or other dues aforeſaid, which became or were due before the making of this act, unleſs complaint be made to the juſtices of the peace in form aforeſaid, before the firſt day of *October*, which ſhall be in the year of our Lord, one thouſand ſix hundred ninety-ſix.

Single coſts.

S. 12. "And it is hereby declared and enacted, that the ſaid juſtices of the peace who ſhall hear and determine any of the matters aforeſaid, ſhall have power to give coſts, not exceeding ten ſhillings, to the party proſecuted, if they ſhall find the complaint to be falſe and vexatious; which coſts ſhall be levied in manner and form aforeſaid.

S. 14.

S. 13. "Provided alſo, and be it further enacted, that if any perſon or perſons ſhall be ſued for any thing done in execution of this act; and the plaintiff, in ſuch ſuit ſhall diſcontinue his action or be nonſuit, or a verdict paſs againſt him, that then, in any of the ſaid caſes, ſuch perſon or perſons ſhall recover double coſts. Double coſts.

S. 14. "Provided always, that any clerk, or other perſon or perſons, who ſhall begin any ſuit for recovery of ſmall tithes, oblations or obventions, not exceeding the value of forty ſhillings, in his Majeſty's court of *Exchequer*, or in any the eccleſiaſtical courts, ſhall have no benefit by this act, or any clauſe in it for the ſame matter for which he or they have ſo ſued. In what caſes this act to be of no force.

The books (ſays (1) the Reverend Mr. Juſtice *Burn*) ſeem to confound the above act of parliament, concerning ſmall (2) tithes *only*, due from any perſon whomſoever, (whether *Quaker* or not, being no way material); and ſtat. 7 & 8 *Will.* III. chap. 34. (3), and 1 *Geo.* I. ſtat. 2. chap. 6. (4), concerning *Quakers* tithes only, great and ſmall, and their other church rates and payments; nevertheleſs the acts are entirely diſtinct in themſelves, and the method of The law reſpecting ſmall tithes in general, and ſmall tithes from *Quakers* in particular, ſeem to be confounded.

(1) 4 *Burn's* Juſtice, p. 297.

(2) Small tithes are the *predial* tithes of other kinds, except corn, hay, or wood, together with thoſe which are called *mixed* and *perſonal*. See 4 *B.* J. P. p. 298. and *ante*, p. iv. v.

(3) See this ſtatute *at large* in our appendix, p. 1282, 1283.

(4) See this ſtatute *at large* in our appendix, p. 1291.

proceeding

proceeding in the one caſe and the other is (1) different in almoſt every inſtance; Doctor *Burn*, therefore, has taken care to extricate them out of this confuſion, by inſerting them ſeparately, and by drawing diſtinct forms upon each, according to the different methods of proceeding.

The different methods of proceeding in each caſe pointed out.

And, *firſt*, as to the ſmall tithe act of 7 & 8 *Will.* III. chap. 6. ſect. 1. the proſecution muſt be for ſmall tithes only, or compoſitions for the ſame; or for offerings, oblations, or obventions, and not otherwiſe; and they muſt amount to above forty ſhillings (2) *a year* from any one perſon.

By *S.* 6. the tithes muſt have become due within two years next before the complaint.

By *S.* 5. they muſt not be in *London*, nor in any place where the tithes are otherwiſe by act of parliament.

By *S.* 14. they muſt not have been begun to be ſued for in the *Exchequer* or eccleſiaſtical court.

Demand.

By *S.* 1. of theſe ſmall tithes, demand muſt firſt be made; and if any perſon ſhall fail in the pay-

(1) The late Mr. Juſtice *Blackſtone*, after obſerving, that "a more ſummary method of recovering ſmall tithes, under the value of forty ſhillings, other thanin the eccleſiaſtical court, or by virtue of ſtat. 2 & 3 *Edw.* VI. chap. 13. is given by ſtat. 7 & 8 *Will.* III. chap. 6. by complaint to two juſtices of the peace," proceeds thus; "and by *another* ſtatute of the ſame year (meaning ſtat. 7 & 8 *Will.* III. chap. 34.) the ſame remedy is extended to all tithes withheld by *Quakers*, under the value of ten pounds," 3 *Black.* Com. 88, 89. and ſo ſays *Burn* himſelf, 3 *B. E.* L. 301. and ſo does the ſtatute 1 *Geo.* I. ſtat. 2. chap. 6. ſect. 4.

(2) The ſtatutable words, "*a year*," are omitted by Mr. Juſtice *Blackſtone*, 3 *Black. Com.* 89.

ment

ment of the ſame, by the ſpace of twenty days after ſuch demand, the perſon to whom the ſame ſhall be due, may make (1) complaint in (2) writing to two juſtices of the peace, neither of whom is patron of the church or chapel, nor intereſted in the tithes. Complaint.

By *S.* 2. the ſaid juſtices ſhall hereupon (3) ſummons in writing under their hands and ſeals, by reaſonable warning, every perſon againſt whom ſuch complaint ſhall be made; and after appearance, or default of appearance (the warning or ſummons being proved upon oath) the ſaid juſtices ſhall proceed to hear and determine the complaint. Summons. Hearing.

By *S.* 8. if on hearing the ſame, any perſon ſhall inſiſt on a preſcription, compoſition, *modus decimandi*, agreement or title, whereby he ought to be freed from payment, and deliver the ſame in writing to the juſtices, ſubſcribed by him, and ſhall then give the party complaining ſecurity, to the ſatisfaction of the juſtices, to pay all ſuch coſts and damages, as upon a trial at law ſhall be given againſt him, in that caſe the juſtices ſhall forbear to give judgment. Pleading an exemption.

Otherwiſe (4) they ſhall, by (5) writing under their hands and ſeals, adjudge the caſe; and give Adjudication.

(1) See the form, *poſt*, xciii.

(2) See the caſe of the *King* and *Furneſſe*, wherein an order for non-payment of ſmall tithes, made on ſtat. 7 & 8 *Will.* III. chap. 6. was quaſhed, becauſe ſaid only upon *complaint generally*, and the ſtatute requires *it* to be writing. *Stra.* 246. 4 *B.* J. P. 298. ſee *poſt*, cii.

(3) See the form, *poſt*, xciv.

(4) 4 *B.* J. P. 299.

(5) See the form, *poſt*, xcv.

ſuch

ſuch compenſation, as they ſhall deem reaſonable; and alſo ſuch coſts and charges, not exceeding ten ſhillings, as upon the merits of the cauſe ſhall appear juſt.

By *S.* 12. the juſtices may give coſts not exceeding ten ſhillings to the party proſecuted, if they ſhall find the complaint to be falſe and vexatious.

By *S.* 3. notice of the adjudication ſhall be given to the party complained of.

Diſtreſs and ſale.

By *S.* 3. if any perſon ſhall refuſe, by the ſpace of ten days after ſuch notice given, to pay or ſatisfy ſuch ſum adjudged, the conſtables or church-wardens, or one of them, ſhall by warrant (1) under the hands and ſeals of the ſaid juſtice, diſtrain his goods, and after detaining them three (2) days (if the money, together with the reaſonable charges for making and detaining the diſtreſs, be not tendered or paid in the mean time) ſhall publicly (3) ſell the ſame, and pay to the party complaining the ſum adjudged, retaining to themſelves ſuch reaſonable charges for making and keeping, as the ſaid juſtice ſhall think fit.

Diſtreſs out of county.

By *S.* 10. if any perſon againſt whom judgment ſhall be obtained, ſhall remove out of the county,

(1) See the form, *poſt*, p. xcvi. xcvii.

(2) The diſtreſs ſhall be detained not leſs than four days or more than eight. Stat. 27 *Geo.* II. chap. 3 *B.* E. L. 498. 4 *B.* J. P. 299.

(3) And the officers may alſo deduct their reaſonable charges of ſelling the ſaid diſtreſs, returning the overplus, if any ſuch be, to the owner upon demand. Stat. 27 *Geo.* II. chap. 20. 3 *B.* E. L. 498. 4 *B.* J. P. 299. But then the juſtices cannot by 27 *Geo.* II. adjuſt the *quantum* of the charges of ſale, as they may by 7 & 8 *Wil.* III. chap. 6. ſect. 3. the charges of *making* and *keeping* the diſtreſs. 4 *B.* J. P. 299.

before the ſum of money ſhall be levied; the juſtices who made the judgment, or one of them, ſhall certify the ſame under hand and ſeal, to any juſtice of ſuch other county, who ſhall by his warrant order the ſame to be levied in like manner.

Appeal.

By *S.* 7. any perſon aggrieved by the judgment of the two juſtices, may appeal to the next ſeſſions, and if they affirm the judgment, they ſhall *decree* the ſame by order of ſeſſions, and give coſts againſt the appellant, to be levied by diſtreſs, as to them ſhall ſeem juſt and reaſonable; and no proceedings herein ſhall be removeable by *certiorari*, or otherwiſe; unleſs the title of ſuch tithes, oblations or obventions ſhall be *in* queſtion.

Certiorari.

Adjudication to be recorded.

By *S.* 9. every perſon who ſhall obtain any judgment, or againſt whom any ſuch judgment ſhall be obtained, ſhall cauſe the ſame to be inrolled at the next ſeſſions, for which the clerk of the peace ſhall have one ſhilling.

Precedents.

Complaint (1) *for Small Tithes, on the* 7 & 8 Wil. III. *chap.* 6.

TO J. P. *and* K. P. *eſquires, two of his Majeſty's juſtices of the peace in and for the county of* ——— A. I. *of* ——— *in the ſaid county, clerk, humbly complaineth,*

That he the ſaid complainant did, by the ſpace of twenty days and upwards before the day of the date hereof, demand of A. O. *of* ——— *in the pariſh of* ——— *in the county aforeſaid, yeoman, the ſmall tithess offerings,*

(1) 4 *B.* J. P. 303, 304.

oblations,

oblations, and obventions juſtly become due within two years now laſt paſt, from him the ſaid A. O. *unto him the ſaid complainant, to the value of four pounds; and that he the ſaid* A. O. *did upon the ſaid demand refuſe, and doth yet refuſe, to pay and compound for, and hath not paid nor compounded for the ſame, nor any part thereof: The ſaid complainant therefore prayeth ſuch redreſs in the premiſes, as to you ſhall ſeem meet, and as to the law doth appertain. Signed the ——— day of ——— in the ——— year of ———*

A. I.

(1) *Summons for Small Tithes; on the* 7 & 8 Wil. III. *chap.* 6.

Weſtmoreland. *To the conſtable of ———.*

WHEREAS complaint in writing hath been made unto us ——— two of his Majeſty's juſtices of the peace for the ſaid county, by A. I. *of ——— in the ſaid county, clerk, that* A. O. *of ——— in the pariſh of ——— in the ſaid county, yeoman, hath for above the ſpace of twenty days before the time of the ſaid complaint ſo made unto us as aforeſaid, refuſed to compound for, or pay unto him the ſaid* A. I. *and hath not yet compounded for, nor paid the ſmall tithes, offerings, oblations, and obventions juſtly due from him the ſaid* A. O. *to him the ſaid* A. I. *Theſe are therefore to command you forthwith, upon ſight hereof, to ſummon the ſaid* A. O. *to appear before us at the houſe of ——— in ———in the ſaid county, on* Saturday *the ——— day of this preſent month of ——— at the hour of — in the forenoon of the ſame day, to anſwer unto the ſaid complaint. And be you then there to certify what you ſhall have done in the premiſes. Given under our hands and ſeals at ——— in the ſaid county, the ——— day of ——— in the ——— year of ———.*

(1) 4. B. J. P. 304.

Order

(1) *Order for Payment of Small Tithes; on the 7 & 8 Wil. III. chap. 6.*

Weſtmoreland. *WHEREAS complaint in writing hath been made unto us ——— two of his Majeſty's juſtices of the peace for the ſaid county, by* A. I. *vicar of the pariſh of ——— in the ſaid county, that* A. O. *of ——— in the ſaid pariſh of ——— in the county aforeſaid, yeoman, did refuſe for the ſpace of twenty days next before the time of the ſaid complaint ſo made unto us as aforeſaid, to pay or compound for his ſmall tithes, offerings, oblations, and obventions, ariſing in the ſaid pariſh of ——— and due to him the ſaid* A. I. *We therefore the ſaid juſtices, being neither of us patron of the pariſh church of ——— aforeſaid, nor any ways intereſted in any of the ſaid tithes, offerings, oblations, or obventions, having duly ſummoned the ſaid* A. O. *before us, and having duly examined the truth and juſtice of the ſaid complaint upon oath, do find that there is juſtly due from the ſaid* A. O. *to the ſaid* A. I. *the ſum of four pounds, being the value of the ſaid tithes, offerings, oblations, and obventions, become due within two years laſt paſt; and do therefore adjudge and order the aforeſaid* A. O. *to pay or cauſe to be paid unto the ſaid* A. I. *the aforeſaid ſum of four pounds, and alſo the ſum of ten ſhillings, for the coſts and charges of the ſaid* A. I. *in proſecuting the ſaid* A. O. *for the recovery of his ſaid juſt dues. Given under our hands and ſeals at ———, in the ſaid county, the ——— day of ——— in the ——— year of the reign of ———.*

(1) 4 *B.* J. P. 304. 305.

Diſtreſs

(1) *Diſtreſs for Small Tithes; on the* 7 & 8 Wil. III. *chap.* 6.

Weſtmoreland. { *To the conſtable of* ——— *in the ſaid county, and to the church-wardens of the pariſh of* ——— *in the ſaid county, and to every of them.*

WHEREAS upon the complaint in writing of A. I. *vicar of the pariſh of* ——— *aforeſaid, in the county aforeſaid,* A. O. *of* ——— *in the ſaid pariſh, in the county aforeſaid, yeoman, hath been duly ſummoned to appear before us* ——— *two of his Majeſty's juſtices of the peace for the ſaid county, to be examined for the non-payment of the ſmall tithes, offerings, oblations, and obventions, due unto the ſaid* A. I. *And whereas we the ſaid juſtices, being neither of us patron of the pariſh church of* ——— *aforeſaid, nor any way intereſted in any of the ſaid tithes, offerings, oblations, or obventions, have duly examined the truth and juſtice of the ſaid complaint, and have ordered him the ſaid* A. O. *to pay unto the ſaid* A. I. *the ſum of four pounds, being the value of the ſmall tithes, offerings, oblations, and obventions, become due from him the ſaid* A. O. *to him the ſaid* A. I. *within two years next before the ſaid complaint ſo made unto us as aforeſaid, together with the ſum of ten ſhillings, for the coſts and charges of the ſaid* A. I. *for the recovery of his ſaid juſt dues; making in the whole the ſum of four pounds ten ſhillings. And whereas it appeareth unto us the ſaid juſtices, that the ſaid* A. O. *had due notice of our ſaid order for the ſpace of ten days and upwards before the day of the date hereof, but hath refuſed to pay, and hath not yet paid the ſaid ſum of four pounds ten ſhillings, nor any part thereof: Theſe are therefore to command you jointly and ſeverally, that you, or ſome or*

(1) *E.* J. P. 305, 306.

one

one of you, do forthwith diſtrain the goods and chattels of the ſaid A. O. *and in caſe the ſaid ſum of four pounds ten ſhillings, together with your reaſonable charges of making and detaining the ſaid diſtreſs, be not paid, or tendred to be paid by him the ſaid* A. O. *in* [*four*] *days next after ſuch diſtreſs made, that then you do make publick ſale of the ſaid goods and chattels ſo diſtrained as aforeſaid, and out of the money ariſing from ſuch ſale, that you pay or cauſe to be paid unto him the ſaid* A. I. *the ſaid ſum of four pounds ten ſhillings, and thereout alſo deduct and detain your reaſonable charges of making, keeping, and ſelling the ſaid diſtreſs; and if any overplus ſhall remain, after ſuch payment and deduction as aforeſaid, that then you do render the ſame unto him the ſaid* A. O. *upon demand. Given under our hands and ſeals at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of* ———.

2. *As to Great and Small Tithes, and other Church Dues from* Quakers *only.*

Recovery of ſmall tithes from *Quakers* in particular.

THIS (1) is upon the acts of 7 & 8 *Wil.* III. chap. (2) 34. and 1 *Geo.* I. ſt. 2. chap. (3) 6. and the proſecution in this caſe may be, for any tithes or church rates, or any cuſtomary or other rights, dues, or payments, belonging to any church or chapel, which of right, by law, and cuſtom, ought to be paid for the ſtipend or maintenance of any miniſter or curate, officiating in any church or (4) chapel.

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(1) 4 *B.* J. P. 300.

(2) See this ſtatute *at large* in our appendix, p. 1282.

(3) See this ſtatute *at large* in our appendix, p. 1292.

(4) Stat. 7 & 8 *Wil.* III. chap. 34. ſect. 4.

Provided (1) the ſame do not exceed the value of ten pounds.

No (2) time is limited within which the tithes ſhall become due.

Complaint.

Where any quaker ſhall (3) refuſe to pay or compound for tithes, any parſon, vicar, curate, farmer, or proprietor of ſuch tithes, or any church-warden or chapel-warden, or other parſon who ought to have, receive or collect, any ſuch tithes, rates, dues or payments, may make (4) complaint to any two, other than ſuch as is patron of the church or chapel, or any way intereſted in the tithes.

Upon (5) which complaint the ſaid juſtices ſhall (6) ſummon in writing; under their hands and ſeals, by reaſonable warning, ſuch *Quaker*; and after appearance (7) or on default of appearance (the warning or ſummons being proved before them on oath) they may proceed to examine on oath or affirmation, as the caſe may require, the truth of the complaint,

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(1) 4 *B.* J. P. 300.

(2) Stat. 7 & 8 *Wil.* III. III. chap. 34. ſect. 4.

(3) Note, here is no number of days limited, between the time of refuſal and the complaint. 4 *B.* J. P. 300.

(4) It is not hereby required, that ſuch complaint ſhall be in writing; but it will be more conformable to the uſual practice in like caſes, if the ſame be in writing. 4 *B.* J. P. 300. For the form of this complaint, ſee *poſt*, p. cvii.

(5) Stat. 7 & 8 *Wil.* III. chap. 34. ſect. 4

(6) See the form, *poſt*, p. cvii.

(7) Stat. 7 & 8. *Wil.* III. chap. 34.

and

and to aſcertain and ſtate what is due and payable and by (1) order under their hands and ſeals, they may direct and appoint the payment thereof, ſo as the ſum ordered as aforeſaid, do not exceed ten pounds; and alſo ſuch coſts and charges, as they ſhall think reaſonable, not exceeding ten ſhillings; and on refuſal to pay, any one of the two (2) *next* juſtices, by warrant (3) under his hand and ſeal, to levy the ſame by diſtreſs and (4) ſale, rendering the overplus, the neceſſary charges of diſtraining being thereout firſt deducted and allowed by the ſaid juſtice; unleſs it be in the caſe of appeal, and then no (5) warrant of (6) diſtreſs ſhall be granted, till after the appeal ſhall be determined. Adjudication.

Any

(1) See the form, *poſt*, cviii.

(2) It is obſervable here, that the ſtatute of 7 & 8 *Wil.* III. chap. 34. ſect. 4. limits the proceedings to the two *next* juſtices (not intereſted) and the ſtatute of 1 *Geo.* I. ſt. 2. chap. 6. ſect. 2. enlarges the ſame to *any* two juſtices (not intereſted) as to the complaint, ſummons, and order, but reſtrains the *diſtreſs* to the limitations in the ſtat. of 7 & 8 *Wil.* III. chap. 34. ſect 4. that is, to one of the two *next* juſtices as aforeſaid; which poſſibly may have been an overſight; for it may happen hereupon, that neither of the two juſtices, who made the order, can enforce the execution of it by diſtreſs; to prevent which inconvenience, it may be proper that *one* at leaſt of the juſtices complained to, be one of the two next juſtices (not intereſted). 4 *B.* J. *P.* 301. See *poſt*, 1285.

(3) See the Form, *poſt*, p. cix.

(4) Here being no time limited for detaining the diſtreſs, nor charges allowed for keeping it, it may therefore be ſold immediately. 4 *B.* J. P. 301 See *poſt*, 1284.

(5) Therefore it ſeemeth beſt not to make out, at leaſt not to execute, the warrant of diſtreſs, until after the next ſeſſions. 4 *B.* J. P. 301. See *poſt*, 1284.

(6) By ſtat. 27 *Geo.* II. chap. 20. which act in all other caſes gives the juſtices of peace power, in their warrant of diſtreſs, to order the goods

Appeal.

Any (1) perſon aggrieved by the judgment of the two juſtices, may appeal to the next ſeſſions, where, if the judgment ſhall be affirmed, they ſhall decree the ſame by order of ſeſſions, and give coſts againſt the appellant, to be levied by diſtreſs and ſale, as to them ſhall ſeem reaſonable; and no proceedings herein ſhall be removeable by *certiorari*, or otherwiſe, unleſs the title of ſuch tithes ſhall come in queſtion.

Certiorari.

It ſhould appear that the title to tithes, is really in queſtion, before a *certiorari* iſſues, to remove an order of two juſtices made on ſtat. 1 *Geo.* I. ſt. 2. chap. 6. ſect. 2.

Rule obtained in *M.* 1755 to ſhew cauſe, why an order of two juſtices, made upon ſeveral *Quakers*, (for payment of tithes under the value of ten pounds to the curate of a chapel) and confirmed at the ſeſſions, upon an appeal from it, ſhould not be quaſhed, together with the order of ſeſſions confirming it (2).

On 26 *November* 1757, *M.* 31 *Geo.* II. cauſe was ſhewn, the order of ſeſſions was given up as not maintainable; but the original order was defended.

To this original order four exceptions had been taken, which were now ſupported, and were as follow:

1. It is a *joint* order made on *different* perſons for *diſtinct* non-payments of *different tithes*; whereas there ought to have been a *diſtinct* order on *each* (3).

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diſtrained to be detained for a certain time, not leſs than four days; the *tithes* and *church rates* of *Quakers* (although not thoſe other dues and payments) above mentioned are excepted. 4 *B.* J. P. 301. See *poſt*, 1285.

(1) Stat. 7 & 8 *Wil.* III. chap. 34. ſect. 5.

(2) See ſtat. 7 & 8 *Wil.* III. chap. 34. and 1 *Geo.* I. ſtat. 2. chap. 6. ſect. 2.

(3) The removal of two different families of *paupers* by one order, was holden bad, though the pariſhes were the ſame. Between the pariſhes of *Chewton* and *Compton Martin*. 1 *Stra.* 471.

2. The

2. The *title* is *in queſtion*, therefore the juſtices have no juriſdiction; the exception in the (1) act is, "*unleſs* the titles of ſuch dues, *tithes*, or payments ſhall be in queſtion;" and theſe words, "unleſs, *&c.*" extend to this *whole* clauſe; and are not confined to the granting a *certiorari* only; and this fact of the title being in queſtion appeared, as was alledged, upon the granting the *certiorari*, in the preſent caſe.

3. *Non conſtat* that the two juſtices who made this original order, are "neither *patrons* nor intereſted in the tithes," but 1 *Geo.* I. ſt. 2. chap. 6. ſect. 2. requires that they ſhall be neither one nor the other; now they ought *expreſsly* to *aver*, and *ſhew* (negatively) "that they *are not*" or elſe they have no juriſdiction by the very words of the act; the juriſdiction being given to "any two or more juſtices," *&c. other than* ſuch as, *&c.*

4. It does not ſufficiently *aſcertain* and ſtate *what* is *due* and payable by the defendants, or, at leaſt, (2) for what the reſpective ſums are due; (3) one ſum is one ſhilling and ſixpence, being due to the curate, not ſaying for what; another is, being the value of their ancient cuſtomary payments," another is, four ſhillings being ancient cuſtomary payments.

This order was made on the act of 1 *Geo.* I. ſtat. 2. chap. 6. ſect. 2. which extends 7 & 8 *Wil.* III.

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(1) *Viz.* 1 *Geo.* I. ſtat. 2. chap. 6. ſect. 2. 1 *Bur.* Rep. 485.

(2) See ſtat. 7 & 8 *Wil.* III. chap. 34. ſect. 4. which act requires the latter. 1 *Bur.* Rep. 486.

(3) This objection is not ſupported by the act. 1 *Bur.* Rep. 486

chap. 34. ſect. 4. to *all payments* to miniſters or curates, officiating in churches or chapels (1).

Anſwers to theſe objections: the ſubſtance of his defence againſt them was fully ſufficient, if true; for the *firſt* was denied to be material, and the *three laſt* to be well founded.

The matter of this motion being mentioned again upon an adjournment, the court inquired whether the return of the *certiorari* was filed.

Lord *Mansfield* ſaid he had called for, and read the affidavits made for obtaining the *certiorari*, and upon ſhewing cauſe, Mr. Juſtice *Deniſon* mentioned a (2) caſe upon a *certiorari* to remove an order made upon the act of 7 & 8 *Wil.* III. for payment of ſmall tithes; where Lord Chief Juſtice (3) *Pratt*, thought that where the RIGHT *was in queſtion*, ſuch caſes were *never intended to be* the ſubject of that act of parliament; he ſaid, this was only ſpoken from a note, which he had ſeen; but it ſhould ſeem to be right (4) and true; and the rather from a (5) caſe,

(1) See ſtat. 7 & 8 *Wil.* III. chap. 34. ſect. 4. which extends *only* to *tithes* and *church rates*. 1 *Bur.* Rep. 486.

(2) The King againſt *Furneſs*, K. B. *H.* 6 *Geo.* I. 1 *Bur.* Rep. 486.

(3) Father of the preſent Lord *Camden*, lord preſident of his Majeſty's moſt honourable privy council.

(4) It is right and true; at leaſt Sir *James Burrow* has a manuſcript note of the ſame caſe, to the ſame effect, or ſtronger; for Sir *James*'s ſays "*By the Court*. The deſign of the ſtatute is only to give a ſpeedy remedy for ſmall tithes, where the right is agreed. 1 *Bur.* Rep. 486. marg.

(5) The King and *Furneſs* being mentioned in 1 *Stra.* 264. 1 *Bur.* Rep. 486.

where an order for non-payment of ſmall tithes made on 7 & 8 *Wil.* III. chap. 6. was quaſhed.

Adjourned to *H.* 31 *Geo.* II.

Lord *Mansfield* now delivered the opinion of the court.

He began with ſtating the two (1) acts, the former relates only to great and ſmall tithes, and *church* rates, and is temporary; the latter makes it perpetual, and extends it to *any* tithes or rates, or *any* cuſtomary or other *rights*, *dues*, or *payments*, belonging to any church or *chapel*, which, of right, by law and cuſtom ought to be paid, for the ſtipend or maintenance of any miniſter or curate officiating in any church or chapel; and both acts direct, "that the proceedings ſhall not be removed into any other court, *unleſs the title* ſhall be in queſtion."

The act was made in *favour* to, and for the *eaſe* and *benefit* of QUAKERS, and to ſave them from troubleſome and expenſive proſecutions; but it *never meant*, that a *mere ſcruple* of theirs, or an OBSTINATE *withholding* of the tithes, ſhould be any hindrance to the matter's being determined by the juſtices of peace; *this* would have fruſtrated the very intention of the act, which meant to give this juriſdiction to the juſtices in *that very caſe* where the *real right and title* to them ſhould not be in diſpute between the parties.

Then his Lordſhip directed the affidavits, on which the *certiorari* was granted, to be read.

It was therein ſworn, on the part of the defendants, "That the defendants *controverted the title* to

(1) *Viz.* Stat. 7 & 8 *Wil.* III. chap. 34. and 1 *Geo.* I. ſtat. 2. c. 6.

the tithes, before the juſtices," and alſo, " That the title to the tithes *was then*, and *at the time* of making the ſaid affidavit, *really in queſtion.*"

The juſtices had notice to ſhew cauſe againſt the *certiorari.*

On ſhewing ſuch cauſe, five old inhabitants of the chapelry ſwore by their affidavit, " That ſuch cuſtomary ſtipends or payments *have always been paid* to the curate by the land-holders, *without* any ſort of ſcruple or objection, *except lately by the Quakers*," and *no other* perſons diſpute it; and theſe five perſons alſo ſwear, " That they believe them *to be due*; and that the *former owners* of *theſe very lands* (which had been purchaſed about four years ago, by theſe *Quakers*) *did pay for them*, as other perſons did, in the ſaid chapelry," and theſe Quakers purchaſed the lands *as ſubject* to ſuch payments; theſe are the affidavits *upon which* the *certiorari* was granted.

Now, if the general allegation " of the Quakers *controverting the tithe*," and the *conſequential aſſertion*, " That the title *was in queſtion*," (without any further particulars, or ſhewing at all *upon what foot* they controverted the payment) ſhould be eſteemed a ſufficient ground for removing the orders, it would put a *total end* to theſe acts of parliament, and *evade* the very deſign and intention of making them.

For the Quakers might pretend, that they are obliged in conſcience to refuſe or controvert the payment of theſe demands, and conſequently to queſtion and deny the right to receive them; now, this is the *very thing* the acts mean to provide a ſummary remedy for; the intention was, that in *ſuch* caſe, the

juſtices

juſtices ſhould make an order to compel them to pay.

Their affidavits are general, "That they controverted the title, and that it was really in queſtion;" whereas by the affidavits made by the five old inhabitants, it is very plain, that the *former owners* of theſe very lands have always paid, and that theſe Quakers, who are the ſubject of this order, have *no pretence* to diſpute it, upon any other foot than their own *general ſcruple* to pay any demands of this nature, which theſe acts are, for their *own eaſe and advantage*, calculated to *compel* them to do, in a method the moſt *gentle* and *convenient for themſelves*, (who ſcruple to pay *without compulſion.*)

We are all of opinion, as to the merits of the caſe, that the title is *not ſo* controverted, or *ſo* in queſtion, as that the juſtices can be precluded from juriſdiction, or their order to be regularly and properly removed into any other court.

And we are all of opinion, that the rule for the *certiorari* having been made abſolute, and the return thereto having been filed, ought not now to ſtand in the way, and prevent our coming at the real juſtice and merits of the caſe; for if the *certiorari* iſſued *improvidé*, we can order it to be *ſuperſeded*, and the *return to be taken off of the file.*

There have been (1) ſeveral inſtances of this; (2) one was, where on order of two juſtices was appealed

(1) Sir *James Burrow* ſuppoſes Lord *Manſfield* meant the caſes of

(2) The King and *Elizabeth Nichols*, *E.* 18 *Geo.* II. *B. R.* and

from;

from; and before the time when the appeal ſhould of courſe have come on at the ſeſſions, a *certiorari* was brought to remove the order; and becauſe the *certiorari* was brought before the time of hearing the appeal was come, the *certiorari* was quaſhed, and the return taken off the file.

The (3) other was a *certiorari* to remove an indictment from the *Old Bailey*; and it appearing to this court, that *they* could not give judgment, but that the *ſeſſions* of *oyer* and *terminer* at the *Old Bailey* ought to do it; the like method was taken, and it was ſent back to the court below, for *them* to pronounce the judgment.

Therefore, upon this caſe, we are all of opinion, that the writ of *certiorari* be ſuperſeded (*quia improvidé*) the return taken off the file, and the order remanded.

His Lordſhip added this hint, to be obſerved in future caſes of this ſort, *viz.* that upon all orders of this kind, the great and material point muſt be, "Whether the *title to the tithes was really in queſtion*, or not; and, if any, then to what point of time." The diſcuſſion of which queſtion, and its determination, *vide poſt*, p. . . the King againſt *Wakefield* and others, *H.* (1) 31 *Geo.* II. *K. B.* 1 *Bur.* Rep. 485. 3 *B.* E. L. 501, 502. *Cunningh.* Law of Tithes 300. 4 *B.* J. P. 301, 302.

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(3) The King and *Govert, E.* 28 *Geo.* II. *B. R. Bur.* Rep. 489. marg.

(1) 8 *February*, 1758.

Complaint

Complaint (1) *for* Quakers *Tithes, on the* 7 & 8 Will. III. *chap.* 34. *and* 1 Geo. I. *ſtat.* 2. *chap.* 6. Precedents.

TO J. P. *and* K. P. *Eſquires, two of his Majeſty's juſtices of the peace for the county of* ——— A. I. *rector of the pariſh church of* ——— *in the ſaid county* [as the caſe ſhall be] *humbly complaineth:*

That A. O. *of* ——— *in the pariſh aforeſaid, in the county aforeſaid, yeoman, being a perſon commonly called a Quaker, hath refuſed to pay unto him the ſaid* A. I. *or to compound for the tithes, and other rights, dues, and payments belonging to the church of* ——— *aforeſaid, and juſtly due to him the ſaid* A. I. *from him the ſaid* A. O. *The ſaid complainant therefore prayeth ſuch redreſs in the premiſes, as to you ſhall ſeem meet, and as to law doth appertain. Signed the* ——— *day of* ———, *in the* ——— ——— *year of* ———.

Summons (2) *of a Quaker for Tithes, on the* 7 & 8 W. III. *c.* 34. *and* 1 Geo. *ſtat.* 2. *c.* 6.

Weſtmoreland. { The conſtable of ———, in the ſaid county.

WHEREAS A. I. *clerk, rector of the pariſh church of* ———, *in the ſaid county, hath complained unto us* J. P. *and* K. P. *Eſquires, two of his Majeſty's juſtices of the peace for the ſaid county, that* A. O. *of* ———, *in the pariſh of* ——— *aforeſaid, in the county aforeſaid, yeoman, being a perſon commonly called a Quaker, hath refuſed to pay unto him the ſaid* A. I. *or to compound for the tithes, and other rights, dues, and payments belonging to the church of* ——— *aforeſaid,*

(1) 4 *B.* J. P. 306. (2) 4 *B.* J. P. 307.

and

and juſtly due to him the ſaid A. I. *from him the ſaid* A. O. *Theſe are therefore to require you forthwith to ſummon the ſaid* A. O. *to appear before us at the houſe of* ———, *in* ———, *in the ſaid county, on* Saturday *the* ——— *day of this preſent month of* ———, *at the hour of* ———, *in the forenoon of the ſame day, to anſwer unto the ſaid complaint. And be you then there to certify what you ſhall have done in the premiſes. Given under our hands and ſeals at* ——— *in the ſaid county, the* ——— *day of* ———, *in the* ——— *year of the reign of* ———.

Order (1) *for Quakers Tithes, on the* 7 & 8 W. III. *c.* 34. *and* 1 Geo. *ſtat.* 2. *c.* 6.

Weſtmoreland. *WHEREAS complaint hath been made unto us* ———, *two of his Majeſty's juſtices of the peace for the ſaid county, by* A. I. *vicar of the pariſh of* ———, *in the ſaid county, that* A. O. *of the pariſh of* ——— *aforeſaid, in the county aforeſaid, being a perſon commonly called a Quaker, hath refuſed to pay to, or to compound with him the ſaid* A. I. *for his tithes, and other rights, dues, and payments, belonging to the church of* ——— *aforeſaid, and juſtly due unto him the ſaid* I. A. *We therefore the ſaid juſtices, being neither of us patron of the pariſh church of* ——— *aforeſaid, nor any way intereſted in any of the ſaid tithes, rights, dues, or other payments, having duly ſummoned the ſaid* A. O. *before us, and having alſo duly examined the truth of the ſaid complaint upon oath, do find that there is juſtly due for the ſame from the ſaid* A. O. *to him the ſaid* A. I. *the ſum of ten pounds, and do order and appoint the aforeſaid* A. O. *to pay, or cauſe to be paid unto him the ſaid* A. I. *the aforeſaid ſum of ten pounds. And we do alſo order and appoint the aforeſaid* A. O. *to pay, or cauſe to be paid unto him the ſaid* A. I. *the further ſum of ten*

(1) 4 *B.* J. P. 307.

ſhillings,

ſhillings, for ſuch coſts and charges concerning the premiſes as upon the merits of the cauſe do appear to us juſt and reaſonable. Given under our hands and ſeals at ———, in the ſaid county, the ——— day of ———, in the ——— year of the reign of ———.

Diſtreſs (1) *for Quakers Tithes, on the* 7 & 8 Wil. III. *c.* 34. 1 Geo. *ſtat.* 2. *c.* 6.

Weſtmoreland. } To the conſtable of ———.

WHEREAS upon the complaint of A. I. *vicar of the pariſh church of ———, in the ſaid county,* A. O. *of ———, in the pariſh aforeſaid, in the county aforeſaid, yeoman, being a perſon commonly called a Quaker, hath been duly ſummoned to appear before* J. P. *and* K. P. *Eſquires, two of his Majeſty's juſtices of the peace in and for the ſaid county, to be examined for non-payment of his tithes, and other rights, dues and payments, belonging to the church of ——— aforeſaid, due unto him the ſaid* A. I. *from him the ſaid* A. O. *And whereas the ſaid juſtices, upon examination thereof, have by writing under their hands and ſeals, ordered him the ſaid* A. O. *to pay unto the ſaid* A. I. *the ſum of ten pounds, for ſuch his tithes, and other rights, dues, and payments as aforeſaid, and moreover the ſum of ten ſhillings, for the charges of him the ſaid* A. I. *in recovering the ſame, making in the whole the ſum of ten pounds ten ſhillings. And whereas it appeareth unto me* J. P. *Eſquire, being one of the ſaid juſtices, and alſo being one of the two next juſtices to the pariſh church of ——— aforeſaid, in the county aforeſaid, not being patron of the ſaid church, nor any way intereſted in any of the ſaid tithes, or other rights, dues, or payments, that the ſaid* A. O. *hath had due notice of the ſaid order, but hath refuſed, and doth refuſe to pay, and hath not paid the ſaid ſum of ten pounds ten ſhil-*

(1) 4 *B.* J. P. 308, 309.

lings,

lings, nor any part thereof: Theſe are therefore to authorize and command you, that you do forthwith levy the aforeſaid ſum of ten pounds ten ſhillings, by diſtreſs and ſale of the goods and chattels of him the ſaid A. O. *and out of the money ariſing from ſuch ſale, that you do pay, or cauſe to be paid unto him the ſaid* A. I. *the ſaid ſum of ten pounds ten ſhillings, and thereout alſo deduct your neceſſary charges of diſtraining. And if any overplus ſhall remain, after ſuch payment and deduction as aforeſaid, that you do render the ſame unto him the ſaid* A. O. *Given under my hand and ſeal at ——— in the ſaid county, the ——— day of ———, in the ——— year of the reign of ———.*

3. *As to Contempts of* MESNE *and other Proceſs for Tithes, in the Eccleſiaſtical Court.*

Contempts of proceſs for tithes in the ſpiritual court.

If (1) the eccleſiaſtical judge ſhall, for any contempt, contumacy, diſobedience, or other miſdemeanor of any defendant, in the caſe of tithes, make information and requeſt to the juſtices of peace of the ſhire where the offender dwelleth, to aſſiſt him to order and reform any ſuch perſon; two of the ſaid juſtices (*quorum* (2) *unum*) may cauſe the perſon to be attached, and commit him to ward, until he ſhall have found ſufficient ſureties to be bound to the King by recognizance, or otherwiſe, to give due obedience to the proceſs, proceedings, decree, and ſentence of the eccleſiaſtical court, where the ſuit ſhall be.

Contempt after judgment.

If any (3) perſon, after ſentence definitive given againſt him in the eccleſiaſtical court, ſhall obſti-

(1) Stat. 27 *Hen.* VIII. chap. 20.

(2) See next page.

(3) Stat. 23 *Hen.* VIII. chap. 7.

nately

nately and wilfully refuſe to pay his tithes, duties, or ſums of money adjudged for the ſame; two juſtices (*quorum* (1) *unum*) may, upon information, certificate, or complaint in writing by the eccleſiaſtical judge, cauſe the party refuſing to be attached and committed to the next goal, till he ſhall have found ſufficient ſureties, by recognizance or otherwiſe, to perform the ſaid definitive (2) ſentence and judgment.

5. *Appeal.*

Difference of appeal from eccleſiaſtical courts, and from courts of equity.

Upon the whole (3) it is obſerveable, that the meaſure of right in the eccleſiaſtical courts by the canons, and in the courts of (4) equity, by the rules of equity, (without much regard to the canons) is very different, which may cauſe confuſion in theſe reſpects; in the former caſe, the laſt reſort is to the delegates (5); in the latter, to the Houſe of (6) Lords.

IV. *Ob-*

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(1) *Quorum unum* (from theſe words in the *Latin commiſſion*, "*quorum unum eſſe volumus*"), for thoſe of the *quorum* were wont to be choſen ſpecially for their knowledge in the laws; but learning being now greatly advanced and improved, ſince the firſt inſtitution of the office of a juſtice of peace; this diſtinction is not of much uſe, for all or moſt of the juſtices are at this day equally aſſigned to be of the *quorum*. See ſtatute 26 *Geo.* II. chap. 27. and 7 *Geo.* III. chap. 21. 3 *B.* J. P. 18, 19. *Gr.* Spir. Bank. Laws, 302. n.

(2) 4 *B.* J. P. 303.

(3) 3 *B.* E. L. 463.

(4) *Viz.* The *Chancery* and *Exchequer*; for the caſes in theſe courts, and fully reported by us, ſee our "chronological table" prefixed to this volume.

(5) This is the great court of appeal in all eccleſiaſtical cauſes, theſe *judices delegati*, [3 *Black.* Com. 66.] are commonly called *delegates*, (according to the language of the civil and canon law) on account of the ſpecial commiſſion or *delegation* they receive from the King, for the hearing

VI. *Obſervations on ſome ſpecial Caſes of Tithes, decided in favour of the Clergy, during the preſent Reign.*

Do not rich Men oppreſs you, and draw you before the Judgment (1) *Seats?*

THESE obſervations are made on the following moſt important, new, intereſting, and authentic cauſes, all determined in favour of the parſon, and in the court of EXCHEQUER (except *Devie* and Lord *Brownlow*, which was heard in *Chancery*); they were all affirmed in the Houſe of Lords, (except *Travis* and *Whitehead*, wherein the decree of the *Exchequer* was reverſed on appeal) and all the ſaid cauſes have happened, within the laſt ten years, of his preſent Majeſty's reign.

The cauſes alluded to are,

1. *Bree* and *Chaplin*, p. 620, 643.
2. *Allet* and *Wilkinſon*, p. 728, 790.
3. *Lloyd* and *Mortimer*, p. 745, 786.
4. *Travis* and *Whitehead*, p. 762, 799, 875.
5. Dr. *Boſworth* and *Limbrick*, p. 809, 934.
6. *Devie* and Lord *Brownlow*, p. 847, 1011.
7. *Adams* and *Hewitt*, p. 965, 992.

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ing and determining any particular cauſe. 1 *B.* E. L. 56. and they are appointed by the King's commiſſion under his Great Seal, and iſſuing out of *Chancery*, to repreſent his royal perſon, and hear all appeals to him made by virtue of ſtat. 25 *Hen.* VIII. chap. 19. See 8 *Eliz.* chap. 5. 3 *Blackſ.* Com. 67. This commiſſion is uſually filled with lords ſpiritual and temporal, and a chief and *puiſne* judge of the courts at *Weſtminſter*, and doctors of the civil law. See 1 *B.* E. L. 56. 3 *Black.* Com. 66.

(6) See our "Chronological Table," prefixed to this volume, for the caſes on appeal.

(1) St. *James* ii. 6.

1. *Bree*

1. *Bree* and *Chaplin*, p. 620, 643.

In order to convince the impartial and unprejudiced part of mankind, how inveterate the enemies of the clergy are, I ſhall take leave to ſtate to them,

Firſt, the nature of this ſuit, as given in a periodical (1) publication, not indeed of any authority, and for that reaſon, perhaps, of more extenſive circulation among thoſe, who are only to read, in order to believe, as few of them have any idea, that what is printed, can be miſrepreſented; and

Secondly, we ſhall lay before the public, ſuch extracts from the true caſe itſelf, as may in ſome meaſure ſhew the real complexion of this litigation, depicted in its own colours; and

Firſt, this ſummary writer conſiders the above caſe, as one of "the ſhameful diſputes that have ariſen between the clergy and laity of late years, to the eternal diſgrace of the former."

"In lieu of tithes in kind (ſays he) it had been a cuſtom, as ancient as the reign of Queen *Elizabeth*, for the owners of large eſtates to agree with the rector or vicar, to pay him a certain ſum, by way of *commutation* or *compromiſe*; but as theſe *commutations* might be made a fraudulent bargain, between the lay impropriator of lands, and the rector or vicar, for the time being, *to the leſſening the value of the benefice, to the ſucceſſors of the prieſt*, a ſtatute was made to render thoſe *commutations* null and void; but it was always underſtood, that though no incumbent could enter into a *commutation* contract, that ſhould bind his ſucceſſor, yet every incumbent might voluntarily accept for himſelf, during the term of

(1) See the "Memoirs of the Right Hon. *Henry* Earl *Bathurſt*," in "*The London* Magazine" for *July* 1782.

his natural life, or of his holding the benefice, ſuch a compromiſe, in lieu of tithes, as he ſhould think proper."

"However about the year 1777, (continues this *informing* writer) a Mr. *Bree*, the rector *or* vicar of an *obſcure* pariſh (we *believe* in *Eſſex*) where there is no church, nor *any parochial duty performed, but the pariſhioners are obliged to go three miles to the next pariſh church, and to requeſt the miniſter of it, to chriſten, marry, viſit the ſick, and bury their dead*; this Mr. *Bree*, after having *accepted*, for ſeveral years, the ſum of FIFTEEN POUNDS yearly, in lieu of tithes, and regularly *giving receipts* for the ſame, to the owner of a manor in the ſaid pariſh (being the *ſame* ſum his *predeceſſors* had *received upwards of two centuries*) thought proper, upon receiving information, that a Mr. CLARKE had purchaſed the eſtate, and laid out twelve thouſand pounds *upon* the *improvement* of it, *ſuddenly* to demand tithes in kind, which, if we miſtake not, were valued at two hundred pounds a year."

"Mr. CLARKE having bought the eſtate, proportionable to an eſtimate of the out-goings, in which FIFTEEN POUNDS were charged as a *commutation*, annually paid to the parſon, was ſtartled at this demand, and refuſed to comply, upon which refuſal *Bree* ſued him, and obtained a *verdict* [*decree*, J. R.] in the court of *Exchequer*, by which CLARKE *found* himſelf *obliged* in future, *to allow Bree* his tithes."

"CLARKE carried the cauſe by appeal to the Houſe of Lords, where the decree of the *Exchequer* court was affirmed, Earl *Mansfield* having informed

formed the lords, that however well diſpoſed their lordſhips might be, to grant relief to Mr. CLARKE, in this (1) *hard* caſe, it was impoſſible to fly in the face of the ſtatute of *Elizabeth*, which *abſolutely* prohibited all *commutations*; but his lordſhip, and ſeveral other noble lords, clearly ſaw, that the ſucceſs of *Bree* would open a door to the inſatiable cupidity of the clergy, and occaſion feuds, animoſities and law-ſuits, throughout the kingdom; he declared, that if *any* noble lord would bring in a bill to provide for the clergy, in a mode more ſuitable to the dignity of their office, than tithes, it ſhould have his firm (2) ſupport.

Secondly, we will proceed to lay before the reader, ſuch extracts from the real caſe itſelf, as will in ſome meaſure ſhew, how erroneous and falſe, the writer alluded to is, in his account of the caſe under conſideration, and yet, that notwithſtanding all his errors and falſity, he has, though moſt *undeſignedly*, (as may be preſumed) really ſtated it, in favour of the parſon.

But I wiſh to obſerve, in the outſet, the very groſs ignorance of this magazine (3) lawyer, in as much as he appears to me, to be an entire ſtranger even to the technical terms of that ſcience, the juſtice of which he is pleaſed to arraign ſo freely, and that too

(1) See our obſervations on the caſe of *Travis* and *Whitehead*, *poſt*, p. cxxiii.

(2) See Introd. xli. xlii.

(3) This lawyer verifies the obſervations of two very eminent men of the profeſſion, for Lord *Coke* ſays, that "*tractent fabrilia fabri*," in Pref. to 3 Rep. and the late Sir *James Burrow*, that "it would be great pity to leave the deciſions of courts of juſtice, filled as the preſent are, to the ignorant, erroneous, and falſe reports of news papers, monthly hiſtorians, and collectors for bookſellers." 4 *Bur.* Rep. 2584.

in the abuſe of one of the moſt uſeful bodies of men, in the three kingdoms.

The terms I allude to, are *commutation* and *compromiſe*; for the writer muſt mean (if he has any meaning) *compoſition*.

His account is alſo otherwiſe moſt egregiouſly erroneous, for the cauſe never came before the court, in the (1) year 1777; the writer confeſſes he does not know, whether the parſon was RECTOR or vicar; he was the (2) former; the name of the defendant is (3) CHAPLIN, not *Clarke*; the county is (4) LINCOLN, not *Eſſex*.

The conſtruction of the ſaid ſtatue of Queen *Elizabeth*, mentioned in the ſaid periodical publication, the reader will find in the following ſheets, to this effect.

"By common (5) law, the parſon, patron, and ordinary might alienate the poſſeſſions of the church; and though the ſtatute of 13 *Elizabeth*, chap. (6) 10. to prevent the impoveriſhment of ſucceeding incumbents, hath reſtrained his power; yet both the

(1) The cauſe came on only in the year 1772, ſee p. 620, and in the year 1775, ſee p. 643.

(2) See p. 620.

(3) See p. 620, 643.

(4) See p. 620.

(5) P. 561, 1124.

(6) See this ſtatute and the obſervations thereon, in our Appendix, p. 1258, 1262.

court

court of *Chancery* and *Exchequer*, have underſtood and expounded the act by a maxim of common law, that *eccleſia meliorari non deteriorari poteſt*, and have been of opinion, that the legiſlature did not intend to prevent *exchanges* or *bargains*, *by which ſucceeding incumbents might be benefited*; for ſtill there are remaining upon the records of both courts, many inſtances, both (1) before and after the decree in queſtion, of decrees eſtabliſhing the like agreements againſt the ſeveral lay parties, their heirs, executors, and adminiſtrators, and againſt the incumbents, and their ſucceſſors, (as the caſe is) none of which, before the preſent (2) were ever impeached by the ſubſequent decree of a court of equity; and this practice continued, until, by the frequency of parliament, it became more convenient to have ſuch agreements eſtabliſhed by the (3) legiſlature."

"This practice cannot be accounted for, unleſs the great perſons, who ſat in both courts, had, upon the conſtruction of the act of parliament, been of opinion, that it was not contrary to law, to eſtabliſh ſuch an agreement, upon pregnant proof made, *that it was for the benefit of the church*; and to give the act of Queen *Elizabeth* a different expoſition, will not only contradict the opinions and acts of the judges of both courts; but, in this caſe, diſturb an uninterrupted quiet enjoyment of lands and tithes for a century and upwards, and may have the like effect upon other parts of the kingdom."

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(1) P. 1124.

(2) *Viz.* That of *Cholmeley* and the Attorney General, under *Michaelmas* Term, 8 *Geo.* III. p. 560.

(3) See p. 549. n.

As the parſon was rector, and his antagoniſt in this cauſe, (1) owner of *two thouſand acres of land* in the pariſh; the obſcurity of the pariſh does not ſeem very evident; the defendant himſelf admitted the parſon's right to eccleſiaſtical (2) dues, it is not therefore probable, that *no parochial duty is performed*; conſequently, all the inconveniencies the pariſhioners are ſaid to be put to, from this rectory being a ſinecure, muſt be conſidered as merely ideal; but beſides, Mr. *Chaplin* did not think fit to make theſe complaints any part of his caſe on his appeal, whence I preſume to contend, that either they were not true in fact; or, if they were true, not at all relevant to the caſe in the dernier reſort.

The parſon's right to tithe of lands, intirely depends on their being barren or cultivated; muſt not the queſtion therefore, in every ſuch caſe, always turn on (3) *improvement?* and is it not admitted by the owner *Chaplin*, that he had laid out twelve thouſand pounds upon *improvements*, and that the tithes in kind thereby, were encreaſed in value to two hundred pounds a year?

And as to the parſon's acquieſcence, for a great number of years, in the acceptance of ſo pitiful an annual ſum of money, as (4) fifteen pounds ten ſhillings and one penny half-penny, in lieu, full ſatisfaction, and compenſation of all tithes whatſoever,

(1) P. 630.

(2) P. 621.

(3) See the caſe of *Stockwell* and *Terry*, under *T.* 22 & 23 *Geo.* II. p. 445.

(4) P. 621, 624, 626, 631.

offerings,

offerings, oblations, abventions, and other ecclesiastical dues, possessions, and (1) rights whatsoever; the same answer may be given, as to the length of time, that was given to the observation made respecting the validity of GENERAL (2) WARRANTS, which observation was, that they had been *unimpeached*, and submitted to, for near a century, and the answer "*that it was therefore high time they should be suppressed*;" so it was, that such a pittance should be refused; but it (3) appears besides, that this temporary composition was at the time when made, and originally accepted, the full value of the tithes of the parish.

The parson obtaining (4) a decree in the court of *Exchequer*, by which the parishioners *found a loss*, in being obliged to pay tithes in future, and that decree affirmed on (5) appeal, seem to be rather circumstances in favour of the parson, than otherwise.

I cannot conclude these remarks, without adding another observation, which is, that Earl *Mansfield*, Lord Chief Justice of *England*, informed the House of Lords, that however disposed their lordships might be to relieve the appellant; and though his was an hard case, THAT IT WAS IMPOSSIBLE TO FLY IN THE FACE OF THE LAW.

But I apprehend, that the writer is mistaken in assigning the above, as the reason, upon which the chief justice urged the lords, to affirm the decree of the court of *Exchequer*, in favour of the parson; be-

(1) P. 632.
(2) See 11 St. Tri. 318.
(3) P. 625.
(4) P. 627, 637.
(5) P. 657.

that no acquieſcence under a temporary compoſition, was in any ſort concluſive or binding, on a parſon's (1) ſucceſſor.

4. *Travis* and *Whitehead*, p. 762, 799, 875.

This is a very extraordinary, and moſt ſingular caſe indeed; for we learn thereby, that one vicar died (2) inſolvent, and another lived upon (3) charity, that the income of the vicarage, though, opulent and extenſive, did not amount to (4) thirty-five pounds a year.

Although the court of *Exchequer* (5) unanimouſly decreed an account of the tithe hay demanded, and, as againſt ſome of the defendants, with coſts, in as much as their own defence had been clearly (6) falſified, and the tilt-penny *modus* in queſtion, had been proved in the cauſe, to be a recompence for the tithes, wholly uncertain, and fluctuating in its amount, ſhifting according to the occupation of the lands, liable to be reduced to a ſingle penny, if not to be totally annihilated, and therefore impoſſible to be ſupported as a legal payment; and, as againſt another defendant the account was directed, without coſts, in conſequence of his having ſet up a defence upon the true ground of the caſe, as fairly as he could, to give himſelf a tolerable chance for (7) ſucceſs.

(1) P. 789.

(2) P. 763.

(3) P. 763, 764.

(4) P. 764.

(5) P. 775.

(6) P. 881.

(7) P. 775, 785.

However

However upon the appeal to the lords, they were pleaſed to reverſe the above decree, becauſe (*it is preſumed*) the parſon, in order to ſupport a bill as vicar for tithes in kind, muſt prove his right to ſuch tithes, either by ſhewing an actual (1) endowment, or by (2) preſcription or (3) uſage; and that the parſon in this caſe had not produced or proved any actual endowment of the vicarage, nor given any evidence of the taking or receipt of any tithe hay in kind, by any of his predeceſſors; and the lords ordered the tilt-penny *modus* to be tried at law, becauſe the evidence given of it on the depoſitions in the court of *Exchequer*, was unexpected, and a ſurprize upon the pariſhioners, and ought not to have been admitted, there not being a word ſaid about it in the bill, nor was it therefore put in iſſue in any manner (4), ſo that the pariſhioners had no opportunity of making any defence, or contradicting the parſon's evidence relating to it, or of croſs examining any of the witneſſes ſo produced, as to the appl ca-tion of the ſaid tilt-penny (5) *modus*.

I have read of *hard* caſes in the books, ſure this ſeems to be one of the deepeſt impreſſion; for let the reader only conſider, that the parſon in this inſtance, did not ſue, till after ſeveral ineffectual attempts had been made by him, to obtain his tithes, by amicable offers, both of reference and (6) arbitration; let him next calculate the enormous expences that muſt attend a cauſe, in which a commiſſion to examine witneſſes laſted forty (7) days, the original hearing of the cauſe

(1) P. 74, 418, 513, 876, 1016.
(2) P. 876, 1016.
(3) P. 515, 876.
(4) P. 877.
(5) P. 784, 785, 877.
(6) P. 764.
(7) P. 764. See 715.

(1) ſix

ſix (1) days, (2) the rehearing four days, beſides the motion for it (3), and add to this, the coſts of the appeal (4).

The court of *Exchequer* was unanimous in their decree for the parſon, having previouſly given their reaſons at large, and alſo over-ruled frivolous objections made by ſeveral pariſhioners, one for want of parties, another in reſpect of the competency of (5) written evidence, and a third to the (6) juriſdiction of the court; nor muſt a remark reſpecting this laſt objection, which fell with ſome ſeverity from the court, be forgot, *viz.* "*That it was proceeding much too far to endeavour to ſerve a particular cauſe, by advancing ſuch doctrines, as, if received, would ſet afloat a great part of the property of the kingdom, and revive litigations, which have been for ages conſidered as at reſt, under the ſanction of the decree of that* (7) *court.*"

Sure it was an hard caſe for the parſon not to ſucceed on an appeal, like the preſent, following two hearings in the court below, of *ten* days continuance, and *two* unanimous decrees, after ſix months mature deliberation, in favour of the parſon, for that theſe ſpecial circumſtances of delay, litigation and expence, ſeem (not ſo much to beſpeak the ef-

(1) P. 775.

(2) P. 806.

(3) P. 799.

(4) P. 881. The proceedings in this cauſe make about one hundred and ſeventeen pages of theſe ſheets, ſee p. 765, 883, 887, 896.

(5) P. 784.

(6) P. 805.

(7) P. 805.

forts

forts of individuals, presuming themselves injured, and seeking redress as) to betray the determined purpose of a powerful combination, *proved in the cause*, to harrass, and if possible to destroy, an (1) unsupported son of the church.

5. Dr. *Bosworth* and *Limbrick*, p. 809, 934.

In this case, many circumstances of deceit and unfair practice were (2) evident; for the tenants of a noble peer of the realm frequently put the milk milked for tithe, into unclean or unwholesome vessels, and sometimes had put *runnet* or other ingredients therein, to injure and spoil it, at other times had permitted pigs and dogs to drink up the same, before the whole milking was over, and oftentimes permitted such pigs to get into the vessels, wherein such milk was placed, and to wallow therein, and also had encouraged and permitted several poor persons to take and carry away said tithe milk, before the cows were all fully (3) milked; and this too after the lord and his tenants had rejected an offer made by the parson, of consenting to accept a sum, at the rate of two shillings and fourpence in the pound, as a composition for all his (4) tithes.

It appeared by the *proofs* in this cause,

That the servants were told by their master, that the tithing day was the "*Devil's* (5) *day*."

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(1) P. 822, 823.
(2) P. 1007.
(3) P. 815, 825, 826.
(4) P. 818.
(5) P. 824.

That

That (1) a chamber-pot of urine was emptied into the tithe milk, and the ſervant maid applauded for doing it.

That the tithe milk was ſpoiled by pigs dung.

Lord *Ducie*'s ſteward declared upon oath, that he received orders from his lordſhip, to acquaint his tenants, that in caſe any ſuit ſhould be brought againſt them by the parſon, relating to his tithes, that his lordſhip would bear them harmleſs, and pay the expence of it, and that the ſteward acquainted the tenants therewith, and that (2) his lordſhip did pay them accordingly.

The court of *Exchequer* remarked on this part of the parſon's caſe, (which was previous to their pronouncing their decree in his favour, and with coſts too on account of the (3) oppreſſion that appeared in the cauſe againſt the parſon), that "*the hiſtory and complexion of this cauſe might be collected from the evidence of a noble lord's bailiff; that the purpoſe of ſetting out the tithe of ſo many different perſons in one and the ſame evening, or time, the court declared was too obvious for them to be miſtaken in; that the noble lord's bailiff had gravely told his lordſhip's tenants, that he was ordered to charge them to play* no tricks, *but his taking advantage*

(1) P. 825.

(2) P. 829, 830.

(3) And yet one of the reaſons aſſigned by theſe pariſhioners, on their appeal to the Houſe of Lords, why the parſon ſhould not have his tithe milk, in the manner he contended he ſhould, is conceived in the following remarkable expreſſion, *viz.* "*That the parſon will thereby acquire a power, where the farmer has incurred his reſentment, of injuring and* OPPRESSING *him, by taking ſuch tithe in kind.* See p. 936, 1008.

of

of what he underſtood to be the letter of the law, *to injure the parſon materially in his right, as well as to diſtreſs him as much as poſſible, in the exerciſe of that right, the court declared was a* plain trick, *diſgraceful to the adviſer of it, and reflecting no* honour *upon any of the parties concerned in, or conſenting* (1) *to it.*"

6. *Devie* and Lord *Brownlow*, p. 847, 1011.

Another peer of the realm, being brought into a court of juſtice by a parſon, for *non* payment of his tithes, inſiſts, that he is not bound to take any notice of the parſon's (2) demand; and being ordered to anſwer the bill, puts in more than one (3) inſufficient anſwer, and that too after an informal plea had been over-ruled (4); and even in the peer's otherwiſe unexceptionable anſwer, he diſputes not only the validity, but even the very exiſtence, as well of ancient endowments, as alſo of grants, although the right honourable defendant thereon founds his own right and title to diſpute that of the parſon; he forces him to the proof of his claim, not only to the tithes really in diſpute, but likewiſe to all tithes belonging to the vicarage, not proved to have been legally granted or taken from the rectory, although all the tithes had been uninterruptedly enjoyed as part of the vicarage; and the noble defendant refuſed to admit, that the parſon was intitled to any tithes whatſoever, and put in iſſue the whole of his claims, as well under ancient endowments, as under the ſaid (5) grants;

(1) P. 831, 832, 843, 844.

(2) P. 857.

(3) P. 858.

(4) P. 858, 871.

(5) P. 858, 859.

Such

Such was the treatment two worthy vicars (one of them a doctor in divinity) met with from parishioners, peers of the realm; the former was most indecently abused and grossly insulted by the servants, dependants, and *vassals* of a nobleman, and at his particular instance and request; and the latter very essentially injured in his property, as well as unprecedently oppressed by the enormous expences and tedious delays, from the vast (1) length of the proceedings, he was put to, by another right honourable opponent; however these sheets shew what a just and spirited resentment, a court of justice was pleased to express, at such shameful perversion of the law, in what an unfavourable point of view, the *Exchequer* held them up in, with what proper severity the barons reproved, with what indignation they treated the whole transaction.

The issue directed (2) in this cause, was tried (3) with every possible advantage to the parties, and to justice, a full special (4) jury of gentlemen attended the trial, (which employed two whole days), many of whom had taken a view of the lands, out of which the tithes in question arose; the parole testimony was almost wholly in favour of the (5) parson.

The noble (6) defendant however, was pleased to apply to the court of *Chancery* (7) for a new trial,

(1) They make about one hundred and twelve pages of these sheets.
(2) P. 859, 861, 872.
(3) P. 861, 874, 1086.
(4) P. 961, 1086.
(5) P. 1086.
(6) P. 861.
(7) P. 1011, 1041.

upon

upon a ſuggeſtion and allegation, that the (1) judge (2) admitted a *great deal of modern evidence on the part of the parſon*, NOT ADMISSIBLE, *and not only* REJECTED ADMISSIBLE EVIDENCE *on the part of the noble defendant, but refuſed many queſtions of law to be debated, and that the jury, under ſeveral* APPARENT (3) MISDIRECTIONS *of the ſaid* JUDGE, *found a verdict for the parſon.*

The Lord Chancellor (4) refuſed to order a new trial, but not till after four days argument by counſel (5); and after the noble "*appellant had been called upon by the court to* leave *with the Chancellor, any title* (6) *deeds or documents in his poſſeſſion, tending to ſhew, that the matters in queſtion, had not been fully inveſtigated by the jury, or that any evidence capable of throwing further light on the objects of inquiry, had not been laid before them,*" nor, till after the chancellor had poſtponed pronouncing his decretal order, fifteen (7) months.

Notwithſtanding ſuch circumſtances, yet, the noble defendant in equity and at law, appealed to his peers, upon general ſuggeſtions of the miſdirection of the judge, in points of law (8), (*inter alia*) in admitting and (9) allowing various papers, not ſigned by any perſon, as evidence, though the ſame was oppoſed by the noble lord's counſel.

(1) Mr. Juſtice *Willes*, p. 861, 874, 1013, 1017, 1041, 1086.

(2) P. 874.

(3) P. 1012, 1013.

(4) P. 1011, 1042.

(5) P. 1041.

(6) See p. 161. n.

(7) P. 1011, 1042.

(8) P. 1012, 1013, 1017, 1018.

(9) P. 1013.

As this right honourable peer appealed againſt a verdict, obtained by the parſon, from the voice of his country, and that verdict confirmed by the lord chancellor; I think the appellant's obſervation would have applied rather more forcibly to his *own* proceedings, on the preſent occaſion, than to thoſe of the reſpondent, which was, "*that* (1) *as the queſtion in iſſue had been already* repeatedly tried, and concluſively *determined againſt the parſon, he ought not therefore to have oppoſed a claim againſt the tenor of their deciſion*," and we may add, by concluding, that there was no reaſon to ſuppoſe any more light could be thrown on the queſtions in diſpute, by further proſecution.

This cauſe had been depending in courts of juſtice, almoſt nine (2) years, and the proceedings therein, within a few pages, were voluminous, even as thoſe, in that of *Whitbead* (3) and *Travis*, and rather more (4) expenſive, but attended with the very material and diſtinguiſhing circumſtance, that the charges fell on the noble peer, and not on the poor parſon; however, as the nature of the right of both parties, ſeemed to be the cauſe of the vaſt length of the proceedings, this we preſume to ſurmiſe, to be the reaſon, that the lords did not affirm the decretal order of the court of *Chancery*, in eſtabliſhment of the law, with coſts.

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(1) P. 1064.

(2) P. 871, 1086. See before, p. cxxviii. n.

(3) See before, p. cxxiv. n.

(4) The parſon was at the expence of a copper plate map. See p. 1070. n.

7. *Adams* and *Hewitt*, p. 965, 992.

We took occaſion, in our (1) obſervations on the cauſe of *Bree* and *Chaplin*, to animadvert on the ſtate of that cauſe, given in a periodical publication; which *ſummary* writer delivers himſelf to the following effect, in reſpect of this ſuit.

" In the mean time, violent proſecutions were ſet on foot, in the neighbourhood of *London*, by the rectors and vicars of pariſhes, where nurſery men and gardeners have hot houſes, and *valuable* plantations, to recover tithes in kind, upon expenſive products; and inſtances the above cauſe of *Adams* and *Hewit*, having been decided by the barons of the *Exchequer*, in favour of the vicar of *Kenſington*, and that it was decreed, that *peaches*, *melons*, *pines*, and all other hot-houſe plants, and exotics, and all ſhrubs, ingrafted trees, and nurſeries, are titheable in kind, whatever expence may attend their cultivation; and concludes with a ſacrilegious parody, of the one of the invocations of the litany."

This blaſphemous parody, it is preſumed, is to ſupply the omiſſion of the following circumſtances, and, in our opinion, rather material; *viz.* that the decree of the *Exchequer* was affirmed (2) by the lords; that Doctor *Waller*, vicar of *Kenſington*, took great pains for an amicable ſettlement with his pariſhioners (3), previous to this ſuit being commenced, and for that purpoſe, he agreed to accept leſs by

(1) See *ante*, p. cxiii.

(2) See p. 1063.

(3) See p. 968, 969, &c.

forty pounds a year, than what the doctor had been accuſtomed to, though that was infinitely below the real value (1), received under the old (2) compoſition for tithes, in lieu of which it was given; that the bargain made with the parſon was ſo beneficial, that his leſſee, upon agreeing for an aſſignment of the original leaſe, had actually for his intereſt under the ſame, ſixty guineas a year *more* than the rent reſerved; and further, that every leſſee, as well as the parſon himſelf, were very deſirous of accommodating the pariſhioners, as to the matters in diſpute, in the moſt friendly and reaſonable manner; but all terms and offers of that ſort, were totally diſregarded, and abſolutely rejected.

May we not conſider the extraordinary conduct *of ſome perſons*, in the cauſes of Doctor *Boſworth* and *Limbrick*, and of *Devie* and Lord *Brownlow*, as much more alarming in another point of view, than as merely diſtreſsful to particular ſons of the church; in that it greatly affects and endangers the religion and morality of the country, for "religion and (3) law do ſtand together, and mutually uphold each other, and are concentered in their original and end; they both come from God, and tend to God; and as religion, ſo the law, was given, *ut cives faciat bonos*, ſaith the philoſopher; and therefore the law, in a Chriſtian ſtate, is not only convenient, but ſo neceſſary, that no ſtate can ſtand and

(1) See p. 973.

(2) P. 966, 967.

(3) Sir *Harbottle Grimſtone* (Maſter of the Rolls, in the reign of King *Charles* the *Second*) his Preface to Sir *George Croke's Reports* in the time of Queen *Elizabeth*.

flouriſh

flouriſh without it; hence it is, that where religion doth find a due regard, a conſcientious practice, and the law a willing ſubmiſſion, and a chearful obedience; there, if any where in the world, the prince will be glorious, and the people happy." Again,

"That the monarchy of *England* is not now capable of being ſupported, but upon the principles of the CHURCH of *England*, from whence it will be very natural to conclude, that the preſerving them both firmly united together, is the likelieſt way for your (1) Majeſty to reign over your ſubjects."

"The religion by law eſtabliſhed, is ſuch a vital part of the government, ſo thoroughly woven and intermixed into every branch of it, that generally men look upon it as a good part of it too; ſince that, and the government of the church, is ſecured to them by the ſame proviſions; ſo that it ſeems that, next to treaſon againſt your ſacred perſon, an invaſion upon the church ought to be watched and prevented by thoſe, who have the honour to be entruſted in the publick adminiſtration, with the ſtricteſt care and diligence, as the beſt way to preſerve your

(1) See the Preface to Lord Chancellor *Clarendon*'s Hiſtory of the Civil Wars, during the reign of King *Charles* the *Firſt*, addreſſed to Queen *Anne*, at the commencement of the preſent century. This hiſtory has met with that reception in the world it deſerves; and I think the publick never was enriched with a nobler piece, in reſpect either of the ſubject or the method; it is the hiſtory of ſuch a rebellion as no age can ever equal, no nation parallel; for it was a rebellion beautified with the colour of law, and adorned with the cloak of religion; upon which advantages it thrived ſo well, that at length it grew too ſtrong for both; being conceived in a long ſerenity of peace, and fed with the liberal hand of plenty, it abhorred at firſt the uſual methods of fury and confuſion, nor ſtarted out immediately into blood and ruin. See *Pref.* to *Clar. Hiſt. Rebel.* al.

perſon and government in their juſt dignity and authority."

But to return: Will it be too much to contend, that encouragement from illuſtrious characters, to vilify and abuſe the ſons of the church, hath not been the leaſt cauſe of the preſent contempt for religion, morality, and good order among mankind? the conduct alluded to, among the pariſhioners towards their paſtors, eſpecially when not only approved, but encouraged by thoſe, whom they think (and ſure have reaſon to think ſo) would not abet ſuch behaviour, if it was wrong or improper; for my own part, from the few obſervations I have been able to make on the feelings of mankind in general, but of the inferior part and lower claſs of them in particular, nothing, in my apprehenſion, ſo firmly cements religion, morality, and good manners, the eſſence (as is ſeen) of every well regulated government, as a proper reſpect towards all ſuperiors, and maſters, and in a more eſpecial manner, towards thoſe who have the cure of ſouls.

Indeed, it cannot but be acknowledged, that there are, even in this work, ſeveral expreſſions, highly derogatory to the moral characters of thoſe who made them, and which, I much fear, has greatly tended to increaſe that diſreſpect, I am now treating of.

Theſe expreſſions are indecent to a degree, in the opinion of the compiler, not to mark them with a ſeverer epithet; we take leave to point out the following, in order to juſtify our cenſure, *viz.* "*as the parſon has* DONE *the* WORK, *and this was but in nature of* (1) WAGES;" again, "*Tithes are the reward for*

(1) See *Dowdeſwell* and *Harker*, T. 18 *Wil.* III. P 93.

the

the trouble and care, the parſon takes of the ſouls of his pariſhioners; in which caſe, the LABOURER *is* WORTHY *his* (1) HIRE (2); a ſingular application this ſure of a text of ſcripture, from the mouth of a lord chancellor, and more ſo, the chancellor alluded to, being Lord *King*, characterized as a religious man, and enrolled, even by a *clergyman*, (Doctor (3) *Prieſtley*) among the Moraliſts of the age.

I ſhould eſteem this publication, the happieſt occurrence of my whole life, ſhould it but occaſion an attempt to reformation, which I moſt devoutly wiſh; and as ſincerely believe, that nothing is more likely to ſtem the torrent of illiberal treatment of the clergy, than all ranks of people, ſeriouſly and reſolutely holding ſuch behaviour as unpardonable, in thoſe under their controul, *viz.* their children, apprentices, ſervants, dependants, and domeſticks of all denominations; and to repreſent the abuſe of the Divine, as a very high breach of religion, morality, obedience, and duty, and that, as ſuch, it will be conſidered, animadverted on, and puniſhed.

VII. *Vindication of the Clergy, from the Imputation caſt on them, on account of their Suits for Tithes.*

I will plead (4) *his cauſe, that ſuffered the wrong* (5); *hear ye the defence, which I make now unto you* (6).

In proceſs of years, the incomes of the poor pariſh prieſts, were ſo ſcandalouſly reduced, by the arbi-

(1) *Luke* x. 7. 1 *Tim.* v. 18.
(2) *Chapman* and *Monſon, Pl.* 3 *Geo.* II. fo. 1115, 1116.
(3) In his Deſcript. Chart Biogr.
(4) *Jerem.* li. 36.
(5) 2 *Cor.* vii. 12.
(6) *Acts* xxii. 1.

trary proceedings of their parishioners, and more particularly of the opulent, and powerful part of them; that they were obliged to have recourse to courts of justice, and demand of the judges there, aid from the laws of their country, in redress.

The honourable, speedy, ample, and effectual relief, *Westminster-hall* so chearfully afforded, and which was affirmed to them, by the wisdom, honour, and integrity of the peers of the realm, in the House of Lords; these circumstances attending the decisions, are, of themselves, to me, a sufficient, and the best vindication of the parson's conduct, as to the suits instituted, for the recovery of tithes.

The litigant parishioners appealed to the dernier resort of the kingdom, in vain expectation, that either the poverty of the parson, or influence in this supreme judicature, would infallibly baffle all efforts of the clergy, to obtain justice, and establish their rights, and in the end prove altogether nugatory, and totally abortive.

However, to proceed; several solemn determinations, recorded in the course of these sheets, must convince the most sceptic reader, that the rector demands his tithes, as his legal property and (1) inheritance, of common (2) right; and the vicar by virtue of his endowment, or by prescription or usage (3);

(1) *Numb.* xviii. 21, 24, 26. 2 *Black.* Com. 30. 3 *Black.* Com. 88. *Smith* and *Wyatt, T.* 15 *Geo.* II. p. 397.

(2) Who receive the office of priesthood, have a commandment to take tithes of the people, *according to the law. Hebr* vii. 5. *Nehem.* xii 44. Corporation of *Bury* and another, and *Evans, E.* 12 *Geo.* II. p. 373.

(3) See Introd. cxxiii.

and

and that conſequently, they both have ſeverally and reſpectively a moſt juſt, equal, and apparent claim, to the coercion of the (1) civil power, to recover ſuch their lawful dues; as much as any heir of the kingdom, when the poſſeſſion or enjoyment, of any part of his paternal, or other eſtate, is illegally detained from him.

So that the popular clamour raiſed againſt this reverend order of men, cannot have originally proceeded from want of, or defect in, their title to ſuch demands; no, the very contrary, in my moſt humble opinion, hath been the ſole cauſe of their injurious treatment; for the indiſputable clearneſs of the clergymens title to tithes, hath occaſioned all the malevolent complaints made againſt them, which have been propagated by deſigning men, intereſted to vilify theſe ſacred characters, in order to conceal their own iniquitous practices, put in ure, for the ſhameful purpoſe of cheating, and robbing this holy body, of the only ſubſiſtence provided for them, and which is allowed them, both by the law of God and man.

A very (2) learned gentleman, delivers himſelf to the following (3) effect, on the preſent ſubject.

"Vicars uſually come into their livings, unacquainted with the particulars of their legal incomes; moſt of which are ſmall, and many quite inſuffici-

(1) See Introd. iii. n.

(2) Doctor *Ducarel*.

(3) 1 *E.* E. L. 73, 74. n.

ent;

ent; whence they are ſometimes tempted to demand more than their dues; but oftner, they who ſhould pay them, take advantage of the ignorance or doubtfulneſs of their miniſter, concerning his rights, and refuſe to acknowledge them; if he ſubmits to take what they are willing to allow him, he lives in ſtraits and contempt; if he conteſts the matter, his people become prejudiced againſt him, for ſome time, if not for ever."

The caſes that have been (1) extracted, and obſerved upon by us, ſeem to afford ample inſtances of the verity, of what was advanced by the learned Dr. *Ducarel*, at the beginning of his preſent majeſty's reign, *viz.* in the year (2) 1761.

The above intereſted individuals, finding that ſome of the clergy, in more enlightened ages, began to ſee through the deſigns of their enemies, and diſcovered what was pretended to be exaction and extortion, was really a ſubſtraction of tithes, they preſumed to talk of their own right, and of the impoſition of their pariſhioners; this unuſual language and conduct in the parſon, began to alarm ſuch of the pariſhioners, as knew themſelves guilty of the encroachments, laid to their charge; they therefore found it neceſſary to call in ſome powerful auxiliaries, to countenance and continue this work of iniquity; POETS therefore and PAINTERS, were immediately enliſted, under the banners of perſecution, and were mean and baſe enough, to let out their talents, and to proſtitute their art, in the infamous cauſe of libel, treachery, deceit, and injuſtice.

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(1) See *ante*. p. cxiii, cxx, cxxi, cxxii, cxxv, cxxvi, cxxvii. cxxxi.

(2) 1 *B.* E. L. 75. a.

Even

Even the celebrated (1) POPE hath given us a ſpecimen of his ſplenetic attack on the clergy, as will appear from the following paſſage, which though not a direct, ſeems to me a pretty ſtrong intimation, of the ſeverity of his diſpoſition, towards the objects of the preſent vindication.

The paſſage alluded to, is introduced in his "Memoirs of *P. P.* Clerk of the Pariſh," and is conceived in the following terms.

"(2) Then follow full SEVENTY CHAPTERS, containing an exact detail of the law-ſuits, of the parſon and his pariſhioners, concerning TITHES, and near one hundred pages left blank, with an earneſt deſire, that the hiſtory might be completed by any of his ſucceſſors, in whoſe time thoſe ſuits ſhould be ended."

The compiler of theſe ſheets, hopes for the honour of being conſidered, as that ſucceſſor of this pariſh clerk, on the preſent occaſion, and that theſe caſes may complete the hiſtory of TITHES, above mentioned by *P. P.*

In ſucceſſion to the POET, came the PAINTER in aid, HOGARTH by name.

This celebrated caricaturiſt, this licentious blazoner of the vices of mankind, in order to dignify the execution of ſo meritorious a deſign, *viz. a ſcandalous delineation of the whole human ſpecies*, with unuſual ſtrokes of grace and fancy, hath depicted (3) the PARSON

(1) See note to *Co.* 1 Inſt. or *Co. Litt.* in the "Table of our AUTHORITIES."

(2) *Pope's* Works, 4 vol. p 217.

(3) We ſhall refer to the plates, as they are exhibited in Parſon *Truſl. Hog.* mor. they ſeeming the beſt collection. See *Nich.* Biogr. Anec. of *Hog.* 95.

in

in the *amiable* characters of (1) DRUNKARD, (2) DEBAUCHEE, and (3) GLUTTON.

Happy I conſider myſelf, in not being obliged, from the province I have aſſumed on this occaſion, to proceed further in deſcription of ſo truly offenſive a publication; as I muſt then have lead the reader, through ſcenes of the moſt groſs obſcenity, have pointed out to his view, exhibitions of the moſt horrid blaſphemy.

Though graphic works of ſo pernicious a tendency, muſt greatly endanger the well-being of ſociety, yet they have been (4) *moralized* by a (5) *parſon*; nay one (6) of the moſt polite writers of the preſent age hath obſerved, that the "*inſtances*" (as he is pleaſed to term them) by us alluded to, "are thinly ſcattered through a great number of works, that there is at leaſt *humour* in moſt of the *incidents* quoted, and that they inſinuate ſome (7) reflection."

The moralizing (8) parſon apologizes, for not inſerting thoſe two (9) infamous prints, "*Before*" and

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(1) In "Midnight modern Converſation."

(2) In the ſixth plate of "The Harlot's Progreſs."

(3) In the firſt plate of "The Election."

(4) See "*Hog.* mor."

(5) The Reverend Mr. *John Truſler.*

(6) Mr. *Horace Walpole.*

(7) Anec. of Paint. iv. p. 149. n.

(8) See *Truſler's* Advertiſement prefixed to his *Hog.* mor.

(9) See *Nich.* Biogr. Anec. of *Hog.* 194, 195.

"*After*,"

"*After*," becauſe they are of too *ludicrous* a nature to have a place in a *moral* (1) work.

Notwithſtanding ſuch *reſpectable* authorities, I cannot but contend, that ſuch repreſentations are a diſgrace to the graphic art, and therefore by no means fit to be framed and glazed, in order to ſupply the place of ornamental (2) furniture, in any houſes but (3) brothels; unleſs for the purpoſe of totally effacing all ſenſe of virtue, morality, religion, and *decorum*.

Methinks (ſays a very ingenious (4) writer, and of the cloth too) a pretty emblem might be contrived of the aids, which the arts and ſciences receive from each other; in which the principal figures ſhould be *painting* and *poetry* (5), with this motto:

Petimuſque damuſque (6) *viciſſim.*

And we may add, that a (7) *poem* is ſimilar to a picture, for a picture is a ſilent poem, and a poem a ſpeaking (8) picture.

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(1) See *Truſler's* Advertiſement.

(2) See *Nich.* 352.

(3) See *Nich.* 195.

(4) The Reverend *James Granger.*

(5) Biogr. Hiſt. *Eng.* p. 127.

(6) *Hor. de Arte Poet.* 11.

(7) *Churchill*, the celebrated ſatyriſt, has prefixed the original words of *Horace* viz. "*Ut Pictura Poeſis*," of which this text is a tranſlation and definition, to his *notorious* Poetical Epiſtle, to WILLIAM HOGARTH. *Nich.* 79.

(8) See *Hor. de Arte Poet.* 361. and the Scholiaſts.

Had

Had not this (1) entertaining and inſtructive writer, confined (unfortunately for the cauſe of literature) his reſearches into the hiſtory of mankind, to the revolution; other thoughts than thoſe already cited by us, as to the uſe, that might be derived from the united efforts, of the ſcience of poetry, and the art of painting, would perhaps have occurred to him; in delineating the characters of *Pope* and *Hogarth*, in the Biographical Anecdotes of the *Poets* and *Painters*, that flouriſhed in the reigns of *Geo.* I. and II. *K. K.*

(1) *Granger.*

A Chro-

A Chronological Table

Of the Lords Keepers, Lord Chancellors, Lords Commiſſioners for the Cuſtody of the Great Seal; Maſters of the Rolls; Lords Chief Barons, and Puiſne BARONS, *Attornies and Solicitors General, and Recorders of the City of* London, *who preſided or ſat in the* Chancery *or* EXCHEQUER, *at* Weſtminſter; *or practiſed at the Bar of theſe ſuperior Courts, in the reſpective Terms, during which theſe Caſes of* TITHES *were argued and finally determined.*

ELIZABETH.

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Sir *William Cordell*, Maſter of the Rolls.
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John Sotherton, *Robert Shute*, } The *only Puiſne* Barons.
Gilbert Gerard, Attorney General.
William Fleetwood, Recorder of *London*.

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John Southcote,
Thomas Carrus,
Thomas Gawdey, } *Puiſ-ne* Juſtices.

Sir *Edmund Anderſon*, Lord Chief Juſtice of the Court of Common Pleas.

Thomas Mead,
Francis Windham,
William Periam, } *Puiſ-ne* Juſtices.

R. M. Lord Chief Baron.

J. S.
R. S.
John Clench, } *Puiſ-ne* Barons.

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Sir *James Dyer*, Lord Chief Juſtice of the Court of *Common Pleas.*

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R. M. Lord Chief Baron.

J. S.
R. S.
Edward Flowerdue, } *Puiſ-ne* Barons.

John Popham, Attorney General.

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Sir *John Puckering*, Lord Keeper.
Sir *Gilbert Gerard*, Maſter of the Rolls.
Edward Coke, Solicitor General.

JAMES the FIRST.

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Thomas, Lord *Elleſmere*, Lord Chancellor.
Edward Bruce, Maſter of the Rolls.
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Sir *Julius Cæsar*, Master of the Rolls,
Sir *Edward Bromley*, one of the Barons of the *Exchequer*,
Sir *Humphrey Winch*, one of the Justices of the *Common Bench*,
Sir *John Doderidge*, one of the Justices of the *King's Bench*, and
Sir *Richard Hutton*, one other of the Justices of the said court of *Common Bench*,
} Lords Commissioners to hear and determine causes in *Chancery*.

Henry Yelverton, Solicitor General.

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3 *Car.* I. p. 12.

Sir *Thomas Coventry*, Lord Keeper.
Richard Shilton, Solicitor General.

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Sir *John Walter*, Lord Chief Baron.
John Denham.
Sir *Thomas Trevor*,
George Vernon,
} *Puisne* Barons.
Robert Heath, Attorney General.
Heneage Finch, Recorder of *London*.

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Edward Littleton, Solicitor General.

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John Liſle,
} Lords Commiſſioners, for the cuſtody of the Great Seal of the Common wealth of *England*

William Lenthall, Maſter of the Rolls.
——— *Ellis*, Solicitor General.
John Glynn, Lord Chief Juſtice of the upper Bench.
Philip Jermyn,
Robert Nicholas,
Richard Aſk,
} *Puiſ-ne* Juſtices:
Oliver St. *John*, Lord Chief Juſtice of the Court of Common Pleas.
Edward Atkyns,
Matthew Hale,
Hugh Windham,
} *Puiſ-ne* Juſtices.
William Steele, Lord Chief Baron.
E. A.
R. N.
John Parker,
} *Puiſ-ne* Barons.
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} *Puiſ-ne* Barons.

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Robert Price.
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Sir *James Montague*, Attorney General.
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Sir *John Forteſcue Aland.*
Sir *William Thomſon* Solicitor General, and Recorder of *London*.

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Sir *Francis Page.*
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Sir *J. C.* } *Puiſne* Barons.
Sir *William Thomſon*
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The Honourable *Charles Yorke*, Solicitor General.
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N. B. Some of the * *cited* Caſes are more at large in this work than uſual.

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OF THE

Abbreviations, adopted in the AUTHORITIES, vouched in the courſe of the Work; with ſome Notes reſpecting them, and the Writers.

*** THE compiler is aware, that a collection of authorities is generally conſidered, as oſtentatious and vain; however, the following conſiderations of inconvenience, to ſay no worſe of it, have induced the preſent compiler to draw up the following explanatory Table; for this work may happen to fall into hands totally unacquainted with the books cited, and readers, even perfectly converſant with all the authorities, may, notwithſtanding, be rather at a loſs to explain ſome of the abbreviations, to be met with, in the courſe of theſe ſheets; and beſides, as the compiler has been rather arbitrary in the adoption of ſome of them, a difficulty therefore may occur to the reader, was he not furniſhed with a ſort of gloſſary, to the moſt obſcure of them at leaſt; beſides, the compiler can ſpeak from ſad experience, that writers citing books by arbitrary contractions, without particularizing the editions referred to by them, when there happen to be ſeveral editions of the ſame books, variant, both in ſize and page; this abuſe (if it may be ſo termed) in citing authorities, occaſions much trouble, as well as great loſs of time; and what adds extremely to ſuch literary diſtreſs, is, that the ſearch generally proves fruitleſs, and of no manner of ſervice.*

A.

Abbreviations.	Explained.
Anc. Dial. EXCHEQUER.	The ancient dialogues concerning the EXCHEQUER, publiſhed from two manuſcript volumes, called the *Black Book*, and *Red Book*, tranſlated (1) into *Engliſh*, 4to edit. 1758.
Anec. Paint.	Anecdotes of Painting in *England*, by *Horace Walpole*, 12mo. edit. 1782.
Andr.	Reports (2) of Caſes by *George Andrews*.
Al.	Caſes in the Court of EXCHEQUER, *&c.* by *John Aleyn*, (3) folio.
Alt. 1 *M.* 10.	Altered by ſtat. 1 *Mary*, chap. 10.
Atk.	Reports (4) of Caſes in the EXCHEQUER and CHANCERY, *&c.* by *John Tracy* (5) *Atkins*, 8vo (6) edit. 1781.
Bac. Abr.	New (7) Abridgement of the Law, by *Matthew Bacon*.

Barnes.

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(1) This dialogue was tranſlated by the compiler of theſe ſheets, the original is in Latin, and ſubjoined to Mr. *Madox*'s Hiſtory of the *Exchequer*. See *Wor. Bibl. Leg.* by *Br.* and *Mad.* Anc. Dial. *Excheq.* in this table.

(2) This collection is much eſteemed, and hath been particularly well ſpoken of by the preſent Lord Chancellor, and alſo by his Majeſty's *primier* ſerjeant at law.

(3) *Wor. Bibl. Leg.* by *Br.*

(4) See *Bur.* Rep. 145.

(5) This reporter was curſitor baron of the *Exchequer*. P. 411.

(6) This edition was prepared for the preſs, by the compiler of this work.

(7) This work, the method and diviſions of which differ from thoſe adopted in all the abridgments before publiſhed, contains many valuable

B.

Abbreviations	Explained.
Barnes.	Notes of cases in point of practice, taken in the court of *Common Pleas*, by *Henry* (1) *Barnes*, 4to edit. 1772.
Barnard. B. R. Chanc.	Reports (2) of *Thomas* [3] *Barnardiston.*
Barr. obſerv. on ſtat.	Obſervations on the more ancient ſtatutes, by the (4) honourable *Daines* (5) *Barrington*, 4to edit. 1775.

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valuable treatiſes upon the moſt important ſubjects of the law. *Wor. Bibl. Leg.* by *Br.* and is generally attributed to *Matthew Bacon* of the *Middle Temple*; but I am apt to think, that the late Lord Chief Baron *Gilbert* was the author of it. I believe, if the reader will only give himſelf the trouble to compare the various treatiſes on the law, generally aſcribed to the Chief Baron, he will have reaſon to incline to my opinion, eſpecially after hearing the following extract from a work of the firſt authority, whereby it appears that the author of the former part of the abridgment in queſtion, is commonly thought to have had the aſſiſtance of ſome papers of the Lord Chief Baron *Gilbert*. The extract alluded to. "For the other learning relating to leaſes which is very curious and diffuſive, I muſt refer the reader to the third volume of *Bacon*'s Abridgment, p. 295. *tit.* "*Leaſes and terms for years*" where the ſubject is treated in a perſpicuous and maſterly manner, being ſuppoſed to be extracted from the *manuſcript* of Sir *Jeoffrey Gilbert*." 2 *Black.* Com. 322. n.

(1) One of the ſecondaries of *that* court. *Ex Autog.*

(2) Serjeant at law.

(3) See 2 *Bur.* Rep. 1142.

(4) Honourable, being brother to a peer, *viz.* Lord Viſcount *Barrington.*

(5) Fellow of the royal and antiquarian ſocieties, one of the juſtices of the grand ſeſſions in *Wales*, and of the King's learned counſel in the law; ſee *Nom.* of *Weſtminſter-hall*, 38, 40, 41, 43. See Biogr. Hiſt. of Sir *Wil. Black.* 51. n. *Cat.* 23, 24, 47, 111.

Abbreviations	Explained.
Batem. Agiſt.	Treatiſe of Agiſtment (1) Tithe, by *Thomas* (2) *Bateman*, 8vo edit. 1778.
——— App.	Appendix to the Treatiſe on Agiſtment Tithe, by the ſame (2) author, 8vo edit.
Berk. Biogr. Lit.	*Biographia Literaria*, by *John Berkenhout*, M. D. quarto, 1777.
Biog. Hiſt. *Engl.*	A Biographical Hiſtory of *England*, by the Reverend *James* (3) *Granger*.
Biog. Hiſt. of Sir *Wil. Black.*	The Biographical Hiſtory of Sir *William Blackſtone* (4), 8vo edit. 1782.
Black. Com.	Commentaries (5) on the Laws of *England*,

(1) See p. 659.

(2) Maſter of arts, chaplain to his Grace the Duke of *Gordon*, and vicar of *Whaplode*, *Lincolnſhire*. *Ex Autog.*

(3) This gentleman was vicar of *Shiplake* in *Oxfordſhire*. *Ex Autog.* It is ſaid that this worthy clergyman died ſuddenly, as he was in the ſolemn act of adminiſtring the holy ſacrament, to his own pariſhioners.

(4) This celebrated lawyer was a judge of both benches, *viz.* *King's Bench* and *Common Pleas*. *Ex Autog.*

(5) It cannot be conſidered as panegyric to ſay, this accompliſhed lawyer has done to the laws of *England*, what *Newton* did to the laws of nature, and *Locke* to thoſe of human underſtanding; for theſe laws are now reſcued from the perplexity and intricacy, in which they were formerly involved; the principles on which they are built, are traced, and ſhewn to be founded on impartial juſtice and right reaſon; they are proved to be uniform and conſiſtent with themſelves, and although branched out into almoſt an infinity of points, yet every part contributes to produce an uniform whole; they are perfectly well calculated to be made the purſuit of gentlemen of liberal fortunes and educations, who cultivate an acquaintance with the *Belles Letters*, as well as to conſtitute the lucubrations of the law ſtudent, who reads them profeſſionally. Theſe advantages in *juriſprudence* are owing to the indefatigable application, to the penetrating acuteneſs, and elegant pen of Sir WILLIAM

Abbreviations	Explained.
	England, by *William* (1) *Blackſtone*, octavo edit. 1778.
Black. Diſc.	Diſcourſe on the Study of the Law, by *William* * *Blackſtone*, Eſq; quarto † edit. 1758.
Black. Rep.	Reports (2) of Caſes in the EXCHEQUER, &c. taken and compiled, by the honourable Sir *William Blackſtone*, late one of the Juſtices of his Majeſty's Court of *Common* (4) *Pleas*; with a Preface (5), containing Memoirs of his Life.

Blunt's

WILLIAM BLACKSTONE, in whom are happily united depth of thought, clearneſs of arrangement, conſummate knowledge, and elaborate compoſition.

" *Hoc tribuiſſe parum eſt, non tribuiſſe ſcelus.*"

See Pref. to *Glanv. de Leg.* Edit. 1780. and *Cat.* in Biogr. Hiſt. of Sir *W. B.* 132, 133. n.

I cannot however conclude, without obſerving, for the ſake of the ſtudent, a point of law laid down by *Blackſtone*, which ſeems now to be otherwiſe determined; and as it reſpects a matter of great importance, *viz.* the due *execution* of WILLS, I take leave to mention it. In 2 *Black.* Com. 306. our author informs the ſtudent, that " it hath been ſometimes held, that *ſealing* includes *ſigning*," and quotes, in authority hereof, 2 *Stra.* 764. The compiler in HIS Edition (*viz.* the *octavo*) of theſe Reports, hath inſerted, by way of marginal note, that the law of this caſe has been doubted by the whole court of EXCHEQUER, to which we refer the reader, for the caſe, and the reaſons the court went upon.

(1) This lawyer was Solicitor general to the Queen, *Ex Autog.* See Biogr. Hiſt. of Sir *W. B.* 25, 26. and n. 28, 29, 108, 109. n. for his various promotions, ſee his Biogr. Hiſt. 38.

* *D. C. L.* Barriſter at Law, and *Vinerian* Profeſſor of the Laws of *England*, in the Univerſity of *Oxford*. *Ex Autog.*

† This addition is not mentioned in *Wor.* Bibl. Leg. by *Br.*

(2) See *Cat.* 140. No. xxvii.

(3) Sir *W.* was Juſtice of both benches. Biogr. Hiſt. 30, 31. *Cat.* 140. n.

(4) By this Preface it appears, that Mr. *Clitherow* was Editor of

Abbreviations	Explained.
Blunt's Dict.	*Thomas Blunt*'s Law Dictionary, folio.
Bob. Law of Tithes.	*William Bohun*'s Law of Tithes, octavo (1), 1760.
B. R.	*Banco Regis.*
Bridgm.	Reports of Sir *John* * *Bridgman.*
Bro.	Grand (2) Abridgment of the Law, by Sir *Robert* (3) *Brook.*
Br. Ap. in Parl.	Reports of Cases upon Appeals in (4) Parliament, by *Josiah Browne.*
Bul. Ni. Pri.	Introduction (5) to the Law relative

these reports; this Preface is the text of Biogr. Hist. of Sir *W. B.* See "*Blackstone*, Sir *William*," "*Clitherow, James*," and "Reports," in the respective indexes, to Biogr. Hist. *Cat.* and *Nom. Westm. Hall.*

(1) The compiler prepared the last edition of this book, for the press.

* Sir *John* was a grave and learned judge, a Serjeant at Law, and Chief Justice of *Chester.* Ex. Autog.

(2) See *Nicol. Engl.* Hist. Libr. 233, 237. *Dugd.* Orig. Jur. 60. Prefaces to 3 & 10 Rep. *Dy.* 163. pl. 175. pl. 249. a. *T. Raym.* 286, 348. *Wor.* Bibl. by *Br.* Mr. Recorder *Fleetwood*'s Pref. to the Tables of the last volume of the Year Books, *Fost.* 366.

(3) Sir *Robert* was Recorder of *London*, *Dy.* 72. a. pl. 1. and Lord Chief Justice of the Court of *Common Pleas*, *Spelm.* Cat. in Gloss. 344. Col. 1. *Dugd.* Cron. See A. D. 1554. Orig. Jur. 48, 216, 225, 329.

(4) See page 1087, 1088. n.

(5) Though this *useful* work, [see 3 *Black.* Com. 367. n.] is supposed to be written by a *learned* judge, *Wor. Bibl. Leg.* by *Br.* and edited by another learned judge; yet it seems necessary, out of regard to the student and young practiser, to observe, that in p. 278. is the following note; "In a writ of inquiry before the sheriff in *debt* on bond and judgment by default, the plaintiff need not prove his *bond*, as if the defendant had pleaded *non est factum*;" and for this is cited "*Hil.* 18 *Geo.* II. *per C. B.*" Now there is a case of *that term* in

Abbreviations	Explained.
	relative to trials at *Nisi Prius*, by *Francis* (1) *Buller*, quarto edit. 1781.
Bulstr.	Reports by *Edward* (2) *Bulstrode*.
Bunb.	Reports of Cases in the Court of EXCHEQUER, by *William* (3) *Bunbury*.
B. E. L.	" Ecclesiastical Law, by *Richard* (4) *Burn*, octavo edit. 1781.
B. J. P.	The Justice of the Peace and Parish Officer, by *Richard* (5) *Burn*.
	Bur.

in *Barnes* 233. but it is upon a promisory note, and says nothing about a *bond*. See also 3 *Wilf.* Rep. 155. 2 *Blackf.* Rep. 748. I may call a writ of *inquiry* in *debt*, a *solœcism* in *law*, because there is no occasion to *inquire* about the demand; for the same is *ascertained* by the *bond*, the penalty therein being the legal demand.

(1) One of the present Judges of the court of *King's Bench*. See Preface to the Biogr. Hist. of Sir *W. B.* iv. and Cat. 139. and *Nomen. Westm.* Hall 38, 42.

(2) Mr. *Bulstrode* was made Chief Justice of *North Wales* by *Cromwell*, and was the first lawyer after my Lord *Coke* who published reports in his life-time. Pref. to 5 Mod. Rep.

(3) This reporter attended for above forty years chiefly at the EXCHEQUER bar, and for the last thirty, in THAT court only; he was *Postman* of the court, that is, the senior barrister, attending constantly at *that* bar, who, as such, had the privilege of moving in the court of EXCHEQUER, before the King's Attorney and Solicitor General, and all his Majesty's counsel. See Pref. to *Bunb.* Rep. 3 *Black.* Com. 28. n.

(4) Chancellor of the diocese of *Carlisle*, and one of his Majesty's justices of the peace, for the counties of *Westmoreland* and *Cumberland*. *Ex Autog.*

(5) Vicar of *Orton* in the county of *Westmoreland*. *Ex Autog.* This skilful, accurate, and judicious writer, is intitled to our warmest acknowledgments,

Abbreviations	Explained.
Bur. Rep.	Reports (1) of Caſes in the Time of Lord (2) *Mansfield*, by Sir *James* (3) *Burrow*.

ledgements, for thoſe practical arrangements which he has made of the laws of *England*, which have been found of the moſt eſſential ſervice in regulating the courts of juſtice, and aſcertaining points of general concernment. The author of the *Commentaries* recommends to the ſtudent the peruſal of Doctor *Burn*'s Juſtice of Peace, as a work wherein he will find every thing relative to the accumulated authority committed to the charge of that magiſtrate, minutely and particularly deduced both from ancient and modern practice, collected with great care and accuracy, and diſpoſed in a moſt clear and judicious method. 1 *Black.* Com. 354. Doctor *Burn* takes great pains to come at the truth of facts, and is moſt accurate and judicious in his obſervations upon them. 2 *Bur.* Settl. Caſ. 549.

(1) Theſe volumes of reports were taken by himſelf with care in court, and afterwards reviſed with judgment at his leiſure; the caſes are ſtated fully, perhaps rather with tediouſneſs, [ſee 5 *Bur.* Rep. 2643.] the arguments of counſel fully, the opinions of the reſpective judges, with their reaſons, are given with perſpicuity and at large; and though they are not uſhered into the world with an *allocatur*, [ſee Biogr. Hiſt. of Sir *W. B.* 106. n.] yet they have been cited with the higheſt *encomium*, by the late Lord Chief Baron *Parker*, and received with equal approbation, in the firſt judicature of theſe kingdoms, [ſee 5 *Bur.* Rep. 2582;] this is an honour which no book hitherto publiſhed in any ſcience, at leaſt in the law, *without an allocatur*, did even before or ſince, attain; and though the learned author's diffidence never ſuffered him to expect ſo diſtinguiſhing a mark of profeſſional eſteem, his merit always intitled him to it. Biogr. Hiſt. of Sir *W. B.* 108, 109. n. ſee Cat. 111. n.

(2) See Cat. 111. n.

(3) Sir *James* was the King's coroner, and attorney in the court of *King's Bench*, commonly called the Clerk of the Crown, or Maſter of the Crown Office, Cat. 111. n. Fellow of the Royal Society, and of the Society of Antiquaries, of *London*, Cat. 49. n. 111. n. and honorary member of the *Societe Antiquites* at *Caſſil*, ſee Sir *James*'s Print.

Bur.

Abbreviations.	Explained.
Bur. Settl. Caſ.	Deciſions upon Settlement (1) Caſes, by the *ſame* author.
	C.
Camd. Eliz.	*Annales* (2) *Rerum Anglicarum et Hibernicarum, regnante* ELIZABETHA, *auctore* CAMDENO 1677.
Cart.	Reports by *Samuel Carter.*
Carth.	Reports of Caſes by *Thomas* (3) *Carthew.*
Carey.	Reports of Cauſes in *Chancery*, by Sir *George* (4) *Carey*, 12mo.
Caſes in the Houſe of Lords.	The printed Caſes of Appeal, given to the Lords and Counſel, and Parties concerned, with the (5) *Manuſcript* Judgments of the Houſe indorſed thereon.
Cat.	Catalogue of the Works of Sir *William Blackſtone*, ſubjoined to the Biogr. Hiſt. of that Judge.
Chanc. Caſ.	Caſes in *Chancery*.
Chanc. Rep.	Reports of Caſes in *Chancery*.
Clar. Hiſt. Rebel. abr.	Hiſtory of the Rebellion and Civil War in *England*, by the Earl of (6) *Clarendon*, ABRIDGED, octavo, 1703.
Co. 1 Inſt. or *Co. Lit.*	Commentary on *Littleton's* (7) Tenures, or firſt Part of the Inſtitutes

(1) See Biogr. Hiſt. of Sir *W. B.* 53, 54. n.

(2) The eſteem of the Annals of Queen *Elizabeth*, compiled by Mr. *Camden*, is as univerſal, as the language, in which they are written. *Steph.* Let. and Mem. of *Bac.* 24. n.

(3) He was a Serjeant at Law. *Wyn.* Serjeant at Law. 92.

(4) This reporter was one of the maſters in *Chancery*. *Ex Autog.* See *Wor.* Bibl. Leg. by *Br.*

(5) See p. 411. n. 574, 587, 620, 728, 745, 763, 809.

(6) Lord High Chancellor of *England*. Ex Autog.

(7) This edition was corrected by Sir *Edward* himſelf, *Wor.* Bibl. Leg. I am credibly informed, that the celebrated Pope, of poetical memory,

Abbreviations Explained.

ſtitutes of the Laws of *England*, by Sir *Edward* (1) *Coke*. *Co.*

very much admired *Littleton*'s Tenures. [See Pref. to *Wyn.* Miſcel.] that a *Gray's Inn* poet tranſlated *Coke* upon *Littleton* into rhyme, [ſee 3 St. Tr. 113], that a law ſtudent, on his travels abroad, made a preſent of *Co. Litt.* to THE POPE, who immediately aſſigned it a place in the Vatican Library, and in the very ſame preſs, wherein are depoſited *Anne Boleyn*'s letters to King *Henry* the *Eighth*. [See Life of Mr. *J. Price*, 59.] I take leave to recommend a *foreign* edition of *Littleton*'s Tenures to the notice of the curious reader, under the following title: "Anciennes Loix des *Francois* conſervées dans les coutumes ANGLOISES, recueillies par LITTLETON; par M. *David Houard*, Avocat au Parlement de *Normandie*, et Conſeiller-Echevin de la ville de *Dieppe*. A *Rouen*." Edit. quarto, 1776; but, to the profeſſional lawyer, that incomparable edition of *Co. Litt.* [See Eſſ. on Fines, 111. n.] proceeded in by Mr. *Hargrave*, will always demand the preference of recommendation; and we have nothing to lament, but that Gentleman's having ſo long delayed the proſecution of that learned, and conſequently laborious, publication. This volume is a very extenſive comment upon a little excellent treatiſe of Tenures, compiled by Judge *Littleton*, in the reign of *Edward* the *Fourth*; it is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method; it is uſually cited either by the name of *Co. Litt.* or as 1 *Inſt.* without any author's name; an honourable diſtinction which is paid to the works of no other writer. 1 *Black.* Com. 73. and n. *It is ſaid*, that one of the crimes laid to the charge of Doctor *Cowell* was, his endeavouring to expoſe *Littleton*'s Tenures. *Nicol.* Engl. Hiſtor. Libr. 235. See Pref. to *Co. Litt. Gatz.* 71. n.

(1) Sir *EDWARD* was Solicitor [*Dugd.* Chron. Ser. A. D. 1592.] Attorney General [Cat. 32. *Dugd.* Chron. Ser. A. D. 1594.] Lord Chief Juſtice of *both* benches, *Spelm.* Gloſſ. 343, 344. *Dugd.* Chron. ſee A. D. 1606, 1613.] The judicial character of this great lawyer, is ſo well eſtabliſhed in the hiſtory of his own country, that to repeat it would be a mere act of ſupererogation; therefore I will proceed to inſtance an example or two of the opinions of *foreigners* reſpecting this lawyer, of infinite learning in his profeſſion, [1 *Black.* Com. 72.]

Abbreviations.	Explained.
Co. 2 Inſt.	The ſecond Part of the (1) Inſtitutes of the Laws of *England*, containing the Expoſition of many ancient and other ſtatutes, *authore Edw. Coke, milite*, J. C.

Co.

" *Sequitur hunc* (viz. Mr. *J. Fitzherbert*, whoſe judicial hiſtory the author had given laſt), ANGLORUM SERVIUS SULPITIUS, *ſui non ſolum ſed omnis ævi inter eos jureconſultus maximus, in quo uno merito aſſeveres artem fuiſſe.* EDWARDUM COKIUM *puto*, LITTLETONII *famam ſin multum ſuperantem, æquantem tamen certiſſime.*" GATZ. 68. The following paſſage in the ſame writer ſhews the opinion foreigners entertain of the WORKS of Sir *Edward*: " *Opera ejus quotidiani atque indubitati adhuc uſus ſunt omnibus, qui ſcribunt, docent, agunt, judicant, id quod vel adverſariorum ejus teſtimoniis confirmatur; ſcripta alia, quibus patriæ profuit, vitamq; plenius enarrant* BENTHEMIUS, Lib. C. ſect. 131. p. 949. *Apud* BENTHEMIUM *ſequens* EJUS *legitur epitaphium.*"

" *Faceſſant hinc monumenta,*
Faceſſant marmora;
Ipſe ſibi ſuum eſt monumentum
Marmore perennius.
Ipſe ſibi ſua eſt æternitas." GATZ. 70, n.

(1) All the Inſtitutes (except the firſt, which was publiſhed in Sir *Edward*'s life-time) were printed by order of the Houſe of Commons, dated reſpectively *Thurſday*, 12 *May*, 1641, and *Friday*, 3 *June*, 1642, [ſee 2 St. Tr. 21. 5 St. Tr. 114. 7 St. Tr. 358. and the end of the 2 Inſt. where may be ſeen both the orders at large,] they reſpectively inhibit every perſon, but the heir of Sir *Edward Coke*, [ſee Cat. 44. n. 45.] from publiſhing the ſame in print; and by the latter it appears, that a bill was paſſing through the Houſe, to ſecure the literary property of the books in queſtion, by veſting them in Sir *Edward*'s heir for a time certain; but on account of the civil war which was then in *embrio*, and ſoon afterwards made ſuch an unhappy progreſs, and came to ſuch a dreadful concluſion, [ſee Introd. cxxxiii. n.] no further proceedings

Abbreviations	Explained.
Co. Rep.	The Reports (1) of Sir *Edward Coke.*
Comb.	Reports of Caſes, by *Roger* (2) *Cumberbach.*
Com. Dig.	" A (3) Digeſt of the Laws of *England,*

ceedings could be had in the ſaid bill; therefore the Houſe ordered, that none but the ſaid heir of Sir *Edward Coke,* or his aſſigns, ſhould print any of the ſaid books, before a full-*year* after his publiſhing the ſame. I cannot but obſerve, that as the Houſe of *Commons* thought *one year's* ſole property in the valuable works of Lord *Coke,* a ſufficient term for his heir, that it could not be expected the Houſe of Lords ſhould adjudge more than the term in ſtat. 8 *Ann.* chap. 19. for the *indiſcriminate* works of *all* authors. See Biogr. Hiſt. of Sir *W. B.* 34, 35. n. 1 *Black.* Com. 73.

(1) Lord Keeper *Somers* obſerved, that Sir *Edward Coke,* in his reports, does not confine himſelf to the caſe before the court, but does generally lay together all the learning in the law, which comes under that title, ſo as to make them in nature of common places. 11 St. Tr. 151, 152. Some of the moſt ancient reports, are thoſe publiſhed by Lord Chief Juſtice *Coke,* which are ſo highly eſteemed, that they are generally cited without the author's name; thus, for inſtance, they are ſtiled Κατ' Εξοχην " *The Reports,*" and, in quoting them, we uſually ſay, 1 or 2 Rep. not 1 or 2 *Coke's* Rep. as in citing other Reporters. 1 *Black.* Com. 72. and n. an honourable diſtinction, which is paid to the reports of no other lawyer. See 1 *Black.* Com. 73. and n. What renders theſe reports more particularly valuable is, that they were compiled principally with a view to the improvement of ſtudents. *Wor.* Bibl. Leg. by *Br.* 16.

(2) The Collector was Recorder of *Cheſter,* and one of the Juſtices of *North Wales.* Ex Autog.

(3) This Digeſt, though unſanctified with an *imprimatur,* was however cited in *Hilary* Term, 8 *Geo.* III. in the court of *Common Pleas,* when Lord Chief Juſtice *Wilmot,* and the whole court, were pleaſed to receive it as authority, and declared it was a good book. The whole of Lord Chief Baron *Comyns's* Digeſt is equally remarkable for great variety of matter, compendious and accurate expreſſion, and excellent methodical diſtribution. *Hargr. Co. Lit.* 17. a.

Abbreviations	Explained.
	England," by Sir *John* (1) *Comyns*, folio edit. 1776.
Com. Rep.	Reports of Caſes, argued and adjudged in the EXCHEQUER, &c. by the ſame author.
Cot. Abr. Rec.	Abridgment * of the Records in the Tower of *London*, by Sir *Robert* † *Cotton*.
Cow. Interpret.	The Interpreter of Words and Terms, uſed either in the Common or Statute Laws, by Doctor *John Cowel*.
Cro. Eliz.	The Reports of Sir *George* (2) *Croke*, in the time of Queen (3) *Elizabeth*, publiſhed by Sir *Harbottle* (4) *Grimſtone*, edit. 1661.
Cro. Jac.	The Reports of the ſame collector, in the time of (5) King *James* the

(1) This eminent lawyer was a Baron of the EXCHEQUER, 2 *R. Raym.* 1420. *Bunb.* 221. Judge of the *Common Pleas*, *Bunb.* 341. and laſtly, Lord Chief Baron of the court of EXCHEQUER. *Com.* Rep. 587. *Bunb.* 343.

* See *Wor.* Bibl. Leg. by *Br.* This abridgment records the ſubſtance of acts of parliament, and other particulars, that are not extant in print, among the ſtatutes, or the Parliament Rolls. *Hargr. Co. Lit.* 133. b.

† This elaborate work is attributed to different authors. See *Pryn.* 4 Inſt. 38, 45. Pref. to 3 *Tyr.* Hiſt. Engl. App. to *Hearn's* Cur. diſc.

(2) He was one of the Juſtices of both benches. *Ex Autog.* ſee Biog. Hiſt. of Sir *W. B.* 35. n.

(3) The *firſt* part, though *laſt* publiſhed, *ex Autog.* and is therefore ſometimes cited 1 *Cro.* ſometimes 3 *Cro.* but more commonly by the name of the Sovereign, in whoſe reign, the caſes reported therein, were determined; this volume, for inſtance, is cited, *Cro. Eliz.* See 1 *Black.* Com. 72. n.

(4) Baronet, Maſter of the Rolls, *ex Autog.* and alſo Speaker of the Houſe of Commons.

(5) This is the ſecond part, in point of publication, *Ex Autog.* as well as in point of chronology; ſo that it cannot be cited wrong, becauſe

D.

Abbreviations	Explained.
	The *Firſt*, publiſhed by the ſame (1) editor, edit. 1659.
Davy. Rep.	The Reports of Caſes in the King's Courts in (2) *Ireland*, by Sir *John* (3) *Davies*, folio.
D. C. L.	Doctor of the Civil * Law.
Degg.	"Parſons Counſellor and Law of Tithes," by Sir *Simon Degge*.
Deſcript Chart. Biogr.	Deſcription of a Chart of Biography, by *Joſeph Prieſtley*, L.L.D. 12mo. edit. 1755.
Dodd's MSS.	"The (4) Manuſcript Reports of Caſes, argued and determined in the Court of EXCHEQUER," by Sir *Samuel* (5) *Dodd*.
Dougl. Rep.	Reports (6) of Caſes, by *Silveſter Douglas*, 1783.

cauſe, a *Cro.* and *Cro. Jac.* both comport, as well with the reign of the Sovereign, as with the time of publication. See 1 *Black.* Com. 73. n.

(1) Sir *Harbottle* was alſo one of the Benchers of the Honourable Society of *Lincoln's Inn*. *Ex Autog.*

(2) Sir *William Jones* ſaid, Sir *John Davies's* Reports were not canonical: and Judge *Doddridge*, that they were drawn up for the meridian of *Ireland* only. *Latch.* Rep. 238. See *Nicol Engl.* Hiſt. Libr. quarto edit. p. 52.

(3) Sir *John* was Solicitor and Attorney General, King's Serjeant at Law, and Speaker of the Houſe of Commons, in *Ireland*, and afterwards one of his Majeſty's Serjeants in *England*, *Dugd.* Chron. Ser. A. D. 1612. 7 St. Tr. 146. In 1626, Sir *John* was appointed Lord Chief Juſtice of *England*; but he died ſuddenly, before the ceremony of his inſtallation, could be performed.

* See Biogr. Hiſt. of Sir *W. B.* p. 96, 97. n.

(4) See p. 353, 361.

(5) Lord Chief Baron of the court of EXCHEQUER, 2 *R. Raym.* 1319. *Bunb.* 1.

(6) This Reporter ſeems to have ſteered a middle courſe, between the two extremes of tedious prolixity, and obſcure brevity.

Dugd.

Abbreviations	Explained.
Dugd. Chron. Ser.	"*Chronica Series*," annexed to "*Origines Juridiciales*," by *William Dugdale*, Norroy King of Arms.
Orig. Jur.	*Origines Juridiciales*, by the ſame author.
Dy.	Reports (1) by Sir *James* (2) *Dyer*, folio.
	E.
E.	*Eaſter* Term.
Ed. Princ. Pen. Law.	"Principles of Penal Law," by *William* (3) *Eden*, octavo edit. 1775.
3 Edw. I. fo. 4.	Year * Books of theſe reſpective
5 Edw. I. fo. 3.	Kings Reigns, with the folios.
8 Edw. IV. fo. 13.	
12 Edw. IV. fo. 13.	
1 & 2 Eq. Caſ. Abr.	Abridgment of Caſes in Equity, (4) Firſt and Second Parts, folio

(1) *Dyer*, for his ſtrictneſs and brevity, may be compared to *Phocion*, an excellent man, of whom *Plutarch* reporteth, that his matter was ſhut up in few words, compendiouſly recited, and with admiration handled. *Fulb.* 27. a.

(2) He was *puiſne* Juſtice of both benches, Biogr. Hiſt. of Sir *W. B.* p. 6. and Lord Chief Juſtice of the Court of *Common Pleas*, *Cat.* to Biogr. Hiſt. of Sir *W. B.* 105. 106. n.

(3) *Wor.* Bibl. Leg. by *Br.*

* See Pref. to *Plowd.* to 3 Rep. to *Cro. Car. Prynne's* Pref. to Cot. Abr. of *Rec. Nicol.* Engl. Hiſt. Libr. *Rym.* Fœd. xviii. 27. *Wor.* Bibl. Leg. by *Br. Eunom.* 3 Dial. 183, 184. *Cart* 91. Pref. to *Dougl.* Rep. vi.

(4) It is worthy obſervation, that the Abridgment of Equity Caſes was publiſhed a year before the book called "Precedents in *Chancery*," whence it was taken by the real author of that abridgement, but not then come to the hands of the publiſher. 21 *Vin.* Abr. 485.

Eunom.

Abbreviations	Explained.
Eſſ. on Fines.	Eſſay on the Nature and Operation of Fines *, octavo edit. 1783.
Eunom.	*Eunomus*, or Dialogues concerning the Law and Conſtitution of *England*, by *Edward Wynne*, (1) octavo, 1774.
Ex Autog.	From the *title* of the book *itſelf*.
F.	
Fitzgib.	Caſes (2) by *John Fitzgibbons*, folio
F. N. B.	New *Natura Brevium*, by *Anthony* (3) *Fitzherbert*, octavo
Forteſc. de Laud. Leg. Angl.	*De Laudibus Legum* (4) *Angliæ*, by Sir *John* (5) *Forteſcue*, octavo edit. 1775.
—— Mon.	The difference between an abſolute and limited Monarchy, by Sir *John Forteſcue Aland*, (6) octavo.

Forteſc.

* This treatiſe is ſaid to be compiled by Mr. *Cruiſe*, of *Lincoln's-Inn*, and ſeems to be the moſt ſcientific treatiſe on the ſubject extant.

(1) *Wor.* Bibl. Leg. by *Br.*

(2) Though Lord Chancellor *Hardwicke* declared *Fitzgibbons*, in general, to be of no authority, *Andr.* 75. yet he obſerved, that the argument of *Reeves*, in the caſe of *Holt* and *Ward*, was a very fine argument, and well reported in that book. 3 *Tr. Atk.* Rep. 306, 610. 2 *Stra.* 938.

(3) Sir *Anthony* was one of the *puiſne* Juſtices of the Court of *Common Pleas*. For a particular account of him, and of his *Natura Brevium*, ſee Cat. 78, 93, 94, 95. n. 96, 97.

(4) See *Nicol. Engl.* Hiſt. Libr. 231, 232. Pref. to *Forteſc. de Laud. Leg. Angl.* Pref. to *Forteſc.* Mon. xli. *Hargr. Co. Lit.* 17. a.

(5) Lord Chief Juſtice and Lord High Chancellor of *England*, under King *Hen.* VI. *Ex Autog.* Pref. to *Forteſc.* Mon. xxxviii. xxxix. but ſee 1 St. Tr. 683. 7 St. Tr. 151. 11 St. Tr. 54.

(6) The Monarchy was publiſhed with ſome remarks, by Sir *John Forteſcue A.* a worthy deſcendant from the Chancellor, [ſee Pref. to *Forteſc.* Rep.] he had deſervedly the character of a general ſcholar,

of

Abbreviations	Explained.
Forteſc. Rep.	Reports as above. (1)
Foſt.	Reports by Sir *Michael* (2) *Foſter*, octavo.
Freem.	Reports of caſes in the EXCHEQUER, *&c.* by *Robert* (3) *Freeman.*
F. S. A.	Fellow of the Society of Antiquaries.
Fulb.	Direction or Preparative to the Study of the Law, by *William Fulbeck*, octavo.
	G.
Gatz.	*Commentatio* (4) *juris exotici hiſtorico-litteraria, de jure communi* ANGLIÆ, of the common Law of *England, per Chriſtianum Hartmannum Samuelem* GATZERT, jurium doctorem, et profeſſorem, extraordinarium in Academia (5) Georgia Auguſta, quarto edit. *Gottingæ ex officinâ Barmeieriana.*

of being very well verſed in the *Northern* and *Saxon* antiquities, and ſat as Juſtice in one of his Majeſty's ſupreme courts of judicature, [*ex Autog.*] with applauſe, and to general ſatisfaction. Pref. to *Forteſc. de Laud. Leg. Angl.* v. Sir *John* was afterwards created a Peer of *Ireland.*

(1) See *Wor.* Bibl. Leg. by *Br.*

(2) Recorder of the city of *Briſtol*, and one of the Judges of the court of *King's Bench, Ex Autog.* Sir *Michael*, if conſidered in the light of a reporter of the caſe only, has been a real benefactor to his country. *Eunom.* 3 Dial. p. 181, 182

(3) He was Lord Chancellor of *Ireland*, ſee Pref. to his Reports, and the character of them, by Lord *Mansfield*, in *Loft.* 419, 420.

(4) *Ex Autog.* Wor. Bibl. Leg. by *Br.* This book is well ſpoke of by the author of the new *Coke* upon *Littleton*, ſee *Hargr. Co. Litt.* 7. a.

(5) There is a great compliment paid the late King *Geo.* II. in the introduction to this curious work.

Gibſ.

Abbreviations	Explained
Gibs.	*Codex* (1) *juris ecclesiastici Anglicani*, by *Edmund Gibson.*
Gilb. Eq. Rep.	Reports of Cases in (2) Equity, in the Exchequer, by Sir *Jeffery* [3] *Gilbert*
Glanv. de Leg.	Tractatus [4] de Legibus et Consuetudinibus regni *Angliæ* tempore regis *Hen.* II. compositus, justiciæ gubernacula tenente, illustri viro Ranulpho de

(1) As the compiler relied implicitly on Doctor *Burn's* quotations from this *Codex*, and having since discovered, from a mere *accidental* occasion, that induced him to examine them, that some of them are by no means accurate, as appears in Introd. lxx. lxxi. n. he therefore takes this opportunity of cautioning the reader, not to trust to them implicitly. The compiler is not able to correct the reverend author, nor to refer his readers to the erroneous passages, cited from *Gibson* by *Burn*, the latter not supplying us with any account of his authorities; this circumstance, seems in some measure, to obviate the use, if not the necessity of this repertory, and may perhaps also shew, that the reasons and observations respecting the convenience and advantage of such a directory as the present, prefixed to this table by the compiler, are not merely and altogether ideal.

(2) Many cases in these reports, seem to be taken from a MSS. copy of that great man Mr. *Pooley*, which are published under the title of "Precedents in *Chancery*," 5 *Vin.* Abr. 408.

(3) Sir *Jeffery* had the honour of being Lord Chief Baron of the court of *Exchequer* in both kingdoms, *viz. England* and *Ireland*, see 6 St. Tr. 188. *Bunb.* 198. see id. 113. and also one of the Lords Commissioners for the custody of the Seal in *Great Britain*, *Bunb.* 185. n. 2 *R. Raym.* 1380. For the judicial character of this celebrated writer, the reader is referred to 2 *Black.* Com. 323. 3 *Black.* Com. 292, 367. 3 *Bur.* Rep. 1284.

(4) *Ex Autog. Wor. Bibl. Leg.* by *Br.*

Abbreviations	Explained.
	de [1] GLENVILLA, cum MSS. *Harl. Cott. Bodl.* et *Mill.* collatus, 12mo [2], edit. 1780.
Godb. Rep.	Reports of certain caſes by *John* (3) *Godbolt.*
Godol. Repert. Canon.	*Repertorium Canonicum.* By *John Godolphin.*
Great Caſe of Tithes.	Great Caſe of Tithes truly ſtated, clearly opened, and fully reſolved, by *Anthony* (4) *Pearſon.* octavo (5) Edit. 1762.
Gr. Spir. Bank. Laws.	The Spirit of the Bankrupt Laws, originally compiled by *Ed-*

(1) Whether the author of this book was the Chief Juſtice, ſeems a queſtion; but all agree, that the Chief Juſtice was the moſt ſkilled, in the law and ancient cuſtoms of the kingdom, of any man of his time. Concerning *Glanville*, ſee Nicol. *Engl.* Hiſt. Libr. 223. Pref. to *this* edition, *Plow.* 357, 368. 1 *Show.* Rep. 121. *Selden* on Eccleſiaſtical Juriſdiction of Teſtaments, 7. Pref. to 8 Rep. Mr. *Davidſon's* pamphlet, 1 *B.* J. P. 470. n. Lord *Lyttl.* Hiſt. *Hen.* II. 267. *H.* H. C. P. 131. *Seldeni Diſſertatio ad Fletam*, chap. 1. ſect. 2. 4 *Black.* Com. 421, 422. 2 St. Tr. 565. 7 St. Tr. 235. 11 St. Tr. 298, 301. *Reeves's* Engl. Law, 170, 171, 174. n. 490, 491. n.

(2) This edition was ſuperintended at the preſs, by the compiler of of theſe ſheets. *J. R.*

(3) Theſe reports were neither taken nor publiſhed by *John Godbolt*, but only reviewed, examined and approved of by him, *ex Autog.* who was one of the juſtices of the court of *Common Pleas*, during the uſurpation. See *Godb.* Rep. 451.

(4) The author of this pamphlet was a juſtice of peace in *Weſtmoreland.* Introd. xxxvii. n. Pref. xii. n.

(5) This pamphlet was firſt publiſhed in the year 1657. Introd. xxxvii. n. Pref. xiii. n.

Abbreviations	Explained.
Gr. and Rud. L. &c.	*Edward* (1) *Green*, Eſq; octavo, 4th Edit. 1780. "The Grounds and Rudiments of Law and Equity." folio Edit. 1741.
H.	
H.	*Hilary* Term.
H. H. C. L.	Hiſtory of the Common Law of *England*, by Sir *Matthew* (2) *Hale*, octavo Edit. (3) 1779.
H. H. P. C.	"*Hiſtoria Placitorum Coronæ*," by the ſame author, octavo Edit. 1778.
Hardr.	Reports of Caſes in the court of *Exchequer*, by Sir *Thomas* (4) *Hardreſs.*
Hargr. Co. *Litt.*	See *Co.* 1 Inſt.
Har. Chanc. Pract.	Practices in the court of *Chancery*, by *Joſeph Harriſon*, octavo, 1779.
Hearne's Cur. Diſ.	Curious Diſcourſes on the Laws and Conſtitution of *England*, and Antiquities, by *Thomas Hearne*, octavo edit. 1771.
12 *Hen.* iv. fo. 20.	The Year (5) Books of theſe King's reigns, with the folios.
21 *Hen.* vi. fo. 20.	
28 *Hen.* vi. fo. 20.	
32 *Hen.* vi. fo. 13.	
34 *Hen.* vi. fo. 38.	
27 *Hen.* vii. fo. 10.	
27 *Hen.* viii. fo. 10.	

(1) This treatiſe was wrote by the compiler of theſe ſheets, who had the honour of being in the commiſſion of bankrupt, ſeveral years.

(2) Sir *Matthew Hale* was one of *Oliver Cromwell's* juſtices *de banco*, Lord Chief Baron of the *Exchequer*, and Lord Chief Juſtice of *England*. See *Roll.* Abr. in this table.

(3) The former edition of this book, which is in great eſteem, was very ſlovenly printed, the errors of the preſs being numerous and groſs. See preface to *Forteſc de Laud. Leg. Angl.* xviii. It is hoped therefore, that this edition by Mr. *Runnington* is corrected; and if the *quality* of it bears any proportion to the *quantity* of the additions, the improvements muſt be very conſiderable indeed.

(4) This reporter was King's Serjeant at law. P. 35.

(5) See *ante*, xv. n.

Abbreviations	Explained.
Hickef. D. E.	(1) *Georgii Hickefii S. T. P. Diſſertatio* Epiſtolaris, ad *Bartholomeum Showere*, equitem auratum, non ita pridem juriſconſultum apud *Anglos*, et cauſarum patronum celeberrimum. *Oxon.* folio Edit. 1703.
Hob.	The Reports of Sir *Henry* (2) *Hobart*, (3) Edit. 1671.
Hut.	The Reports of Sir *Richard* (4) *Hutton.*
J.	
J. C.	*Juriſconſultus.*
Imp. New Inſtruct. Cler.	New (5) *Inſtructor Clericalis*, by *John Impey*, octavo, 1782.
2 Inſt.	See *Co.* 2 Inſt.
W. Jon.	The Reports of Sir *William* (6) *Jones*,

(1) That which more particularly recommends even Doctor *Hickes's Theſaurus*, [See it in this table] to the peruſal of all lawyers, as well as antiquaries and hiſtorians, is, that there is therein to be found an epiſtolary diſſertation to Sir *Bartholomew Shower*, a large and very learned treatiſe on the antiquities of the laws of *England*, wrote on purpoſe for the honour of our laws, and for the uſe of the profeſſors thereof. *Forteſ.* pref. to *Mon.* lxxx. lxxxi. It is great pity, that this treatiſe was not printed ſeparately; the *Theſaurus*, of which it is a part, being very ſcarce. Pref. to *Forteſc. de Laud. Leg. Angl.* xviii.

(2) Sir *Henry* was a baronet, chancellor to two Princes, of *Wales*, and Lord Chief Juſtice of the court of *Common Pleas*. *Ex Autog.*

(3) This edition was publiſhed by *Heneage Finch*, afterwards the celebrated Lord Chancellor *Nottingham*. See pref. to 5 Mod. where you may read an excellent character of theſe reports.

(4) One of the Judges of the *Common Pleas*, *ex Autog.* For his judicial character, ſee Lord Keeper *Bacon's* ſpeech to him on his promotion, and Biogr. Hiſt. of Sir *W. B.* 89.

(5) This book ſeems to me to have great merit.

(6) The author was one of the juſtices of both benches in *England*, and had been chief juſtice of *Ireland*. *Ex Autog.* For his judicial

K.

Abbreviations	Explained.
Keb.	Reports by *Joſeph* (1) *Keble.*
Kel.	Report of caſes, in pleas of the crown, by Sir *John* (2) *Kelyng.*

L.

Law.	Reports in the court of EXCHEQUER, by *Richard* (3) *Law.*
Latch. Rep.	Caſes by *John Latch.*
Leon.	Reports and Caſes, by *William Leonard.*
Lev.	Reports of Caſes, by Sir *Creſwell* (4) *Levinz.*
Ley Rep.	Reports of Caſes by Sir *James* (5) *Ley.*
Life of Mr. *J. Price.*	The (6) Life of the Honourable *Robert* (7) *Price,* Eſq; 12*mo.* edit. 1734.

judicial character, ſee (Lord Keeper *Bacon*'s ſpeech upon this promotion. *N. B.* This is cited 1 *Jo.*

(1) Lord Chief Juſtice *Hardwicke* gave him the character of a good regiſter but a bad reporter. *Farteſc.* Rep. 162. *Keble* is ſtiled by Mr. Juſtice *Burnet,* an inaccurate reporter, but a tolerable hiſtorian of the law. 3 *Wilſ.* Rep. 330. See *Skin.* 565. pl. 12.

(2) Lord Chief Juſtice of his Majeſty's court of *King's Bench. Ex Autog.*

(3) This reporter was Lord Chief Baron of the *Exchequer,* and Lord Keeper of the Great Seal of *England. Dugd.* Chron. See A. D. 1643.

(4) He was Attorney General, and one of the Juſtices of the court of *Common Pleas. Wyn.* Serjeant at Law, 84.

(5) This celebrated lawyer was Attorney of the Wards, Baronet, Lord Chief Juſtice *B. R. Spelm. Gloſſ.* 343. Col. 1. and Earl of *Marlborough,* Lord High Treaſurer, *Dugd.* Chron. Ser. A. D. 1624.

(6) This work was printed by appointment of the family, *ex Autog.* It is groſly *miſpaged,* for p. 57,. to p. 64, both incluſive, are repeated no leſs than three ſeveral times; though that part of the book conſiſts only of 80 pages.

(7) Mr. *Price* was one of the Juſtices of his Majeſty's court of *Common Pleas. Ex Autog.*

Litt.

Abbreviations	Explained.
Litt. Rep.	Reports (1) in the EXCHEQUER, by *Edward* (2) *Littleton*.
L. L. D.	Doctor of Law.
Loft's Rep.	Reports of Cases, by *Capel* (3) *Loft*.
Lords Journ.	Journals of the House of Lords.
Lytt. Hift. *Hen.* II.	The (4) History of the Reign of King *Henry* the *fecond*, by the right honourable *George*, Lord *Lyttleton*, quarto.
M.	
Mad. Anc. Dial. *Excheq.*	The correct copy of the (5) ancient Dialogue concerning the EXCHEQUER, aſcribed to *Gervaſius Tilburienſis*, ſubjoined to *Thomas Madox's* Hiſtory and Antiquity of the EXCHEQUER.
	Manwood

(1) See *Cat.* to the Biogr. Hiſt. of Sir *W. B.* 98. n. Pref. to *Dougl.* Rep. vii.

(2) The Collector was Solicitor General, Chief Juſtice of the *Common Pleas*, Lord Keeper; and a Peer of the realm. *Cat.* 108. n. *Ex Antog.*

(3) The late Sir *James Burrow* is pleaſed to pay this reporter rather an *extraordinary compliment*. See 4 *Bur.* Rep. *in calcem.*

(4) See Pref. to *Glanv. de Leg.* edit, 1780.

(5) This Dialogue, which does not appear to have been extant before Mr. *Madox* gave it the public, at the end of his hiſtory of the *Exchequer*, is frequently cited by Lord *Coke*, and other authors of great repute, under the title of OCKHAM; but it is not eaſy to gueſs at Lord *Coke*'s reaſon for ſo citing this Dialogue. It was however referred to, by Sir *Henry Spelman*, before the publication of *Co. Lit.* by the name of OCKHAM, in Gloſſ. *verb.* "*Juſticiarius*," and by the name of *Gervaſius Tilburienſis* (to whom it is commonly aſcribed) in *verb. Scaccarium*," and again by the ſame learned author, as a part

Abbreviations	Explained.
Manwood.	Treatiſe of the Laws of the Foreſt, by *John Manwood.*
Mo. Rep.	Caſes (1) collected and reported by Sir *Francis* (2) *Moore.*
Mod.	Modern (3) Reports.
8 & 9 *Mod.*	Modern (4) Caſes in Law and Equity.
	Moſ.

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of the *liber major* in *verb.* "*Bar. Scac.*" It is alſo quoted by Doctor *Cowell*, under the deſcription of *Ockham*'s *Lucubrations*, in his Interpret. *verb.* "*Exchequer.*" See *Wor. Bibl. Leg.* by *Br. Hargr. Co. Litt.* 69. a. See alſo *Reeves*'s Engl. Law. 170.

There was a *Nicholas de Ockham*, or *Ockham*, clerk to the treaſurer of the *Exchequer*, who died 34 *Edw.* I. See *Mad. Excheq.* 2 Vol. p. 304. *Wor. Bibl. Leg.* by *Br.* It is contended, that *Richard* the ſon of *Negell* Biſhop of *London*, and not *Gervaſe* of *Tilbury*, is author of the above Dialogues. See *Gatz.* 24. n. and Anc. Dial. *Excheq.* in this table.

(1) Theſe caſes were edited by Mr. Attorney General, Sir *Geoffrey Palmer. Ex Autog.*

(2) The reporter was a celebrated Serjeant at Law in his time. *Ex Autog.*

(3) Theſe Reports are divided into twelve parts, and are thus diſtinguiſhed; the firſt ſix numerically, 1, 2, &c. 7 *Farreſley*, 8 & 9, ſee next note, 10. *Lucas.* 11. Reports in the time of Queen *Anne.* 12. Caſes in the time of *Wil.* III. See *Wor. Bibl. Leg.* by *Br.*

(4) The late Sir *Michael Foſter* obſerves, that a caſe in 8 *Mod.* Rep. 264. is *wretchedly* reported. *Foſt.* 374. n. and the late Sir *James Burrow* makes a ſimilar objection to the ſame book: See 1 *Bur.* Rep. 386. 3 *Bur.* Rep. 1326. 4 *Bur.* Rep. 2530. 11 St. Tri. 304. Col. 2. marg. In 1769, the compiler of theſe ſheets being favoured by the ſaid Sir *James*, with a copy of the ſaid reports, wherein the principal deficiences are ſupplied, and the moſt conſiderable errors rectified by Sir *James* himſelf, in his *own* hand-writing, the compiler edited this book that year, after having carefully compared it with the ſaid manuſcript. See 4 *Bur.* Rep. 2530. Upon hearing that a *young Gentleman*, [ſee Adv. to *Foſt.* xxvi.] was about publiſhing a new edition of Mr. Juſtice *Foſter*'s Reports, I cauſed it to be ſignified to him, that his Uncle's ignominious character of the ſaid 8 *Mod.* was now in a great

Abbreviations	Explained.
Mos. Rep.	Reports of Cases in *Chancery*, by *William Mosley*.
	N.
n.	Marginal Notes.
Nels. Chanc. Rep.	Reports in *Chancery*, by *William Nelson*, octavo Edit. 1717.
Nels. Chanc. Rep. *temp. Finch.*	Reports (1) of Cases in *Chancery*, during the time Sir *Heneage* (2) *Finch* was Lord Chancellor, by *William Nelson*, folio Edit. 1725.
Nich. Bib. Typ. Brit.	*Bibliotheca Typographica Britannica.* No. vii. by *John* (3) *Nicholas*, quarto Edit. 1782.

great measure removed. Though this circumstance was communicated to the editor, time enough to have availed himself of the hint, yet he has thought proper to suffer the *damning* imputation still to remain. The compiler thinks there was great disrespect shewn to Sir *James*, some injustice to the proprietors of the book, as well as to himself, in rashly rejecting, without assigning any reason, such friendly literary communication; especially, as the compiler presumes to consider the same an improvement of *Foster*.

(1) Lord Chancellor *Hardwicke* observed, that a book called Reports in *Chancery*, in Lord *Nottingham*'s time, was of no authority. 3 *Tr. Atk.* Rep. 334. and this same *prætorian* judge so declared in another case, *Wilf.* Rep. 162. The late Lord Keeper *Henley* (afterward Lord Chancellor *Northington*) said "I have looked into the case of *Edgerley* and *Price*, which see p. 43. reported in *Finch*'s Reports, and think it a very extraordinary one, I can pay no credit to the case, nor do I look on it as any authority, but only the dream of some note-taker in this court." See p. 547.

(2) This lawyer was Solicitor General to King *Charles* the *second*. See *Dugd. Orig. Jur.* 157. and that celebrated Lord Chancellor, the Earl of *Nottingham*; see his character drawn by Sir *William Blackstone*, in the Biogr. Hist. of that Judge, 79. n. and see *Hob.* in this table.

(3) *F. S. A. Eding.* corresp. *Ex Autog.*

Abbreviations	Explained.
Nich. Biogr. Anec. of *Hog.*	Biographical Anecdotes of *William Hogarth*, by the ſame Author, octavo Edit. 1782.
Nicol. Engl. Hiſt. Libr.	The *Engliſh* Hiſtorical Library, by *William* (1) *Nicolſon*, folio Edit. 1714.
Nom. of *Weſt. hall.*	*Nomenclature* of *Weſtminſter-hall*, annexed to Biogr. Hiſt. of Sir *W. B.*
Noy Rep.	Reports (2) and Caſes, by *William* (3) *Noy.*
O.	
Ow.	The (4) Reports of *Thomas* (5) *Owen.*
P.	
P.	The pages of this work.
Palm. Rep.	Reports by Sir *Geoffrey* (6) *Palmer.*

(1) Biſhop of *Carliſle. Ex Autog.*

(2) As Lord *Hale* makes ſo frequent a reference to *Noy*'s Reports, it may not be amiſs to appriſe the ſtudent, that though the book is known by the name of that very learned lawyer, yet there is not the leaſt reaſon to ſuppoſe, that ſuch a looſe collection of notes, was intended by him for the publick eye. In an edition of *Noy*'s Reports *penes editorem*, there is the following obſervations upon them in *manuſcript*: "A ſimple collection of ſcraps of caſes made by Serjeant *Sizer*, [*quære Ziſe*, ſee *Sid.* Rep. 3.] from *Noy*'s looſe papers, and impoſed upon the world for the Reports of that vile prerogative fellow *Noy*." This account of *Noy*'s Reports, which was probably written ſoon after the firſt publication in 1656, though expreſſed in terms inexcuſably groſs, contain an anecdote not altogether uſeleſs. *Hargr.* Co. *Litt.* 54. n.

(3) He was Attorney General. *Ex Autog.*

(4) Theſe Reports reconcile many ſeemingly diſagreeing ſentences in the Year-book, *Ex Autog.* Though there is a vacancy in the pages of *Owen* from 77 to 80, both incluſive, yet the book is perfect. *Wor. Bibl. Leg.* by *Br.*

(5) *Owen* was one of the Juſtices of the *Common Pleas. Ex Autog.* See *Cat.* 88, 89, 90, 91.

(6) Sir *Geoffrey* was Attorney General, ſee *Mo.* Rep. in this Table.

Park.

Abbreviations	Explained.
Park. Rep.	Reports of Caſes in the *Exchequer*, by Sir *Thomas* (1) *Parker*.
P. or *Peer Wil.*	Reports (2) of Caſes in *Chancery*, by *William Peere Williams*, (3) 1768.
Plow.	Commentaries or (4) Reports of *Edmund* (5) *Plowden*.
Pope's Works.	12mo. Edit. 1770.
Pref. Diſc. to *Grten.*	Prefatory Diſcourſe to (6) *Green.*
Pryn. 4 Inſt.	Animadverſions, *&c.* on Sir *Edward Coke's* fourth part of his Inſtitutes of the Laws of *England*, by *William Prynne*, folio.
R.	
Raſt.	Entries by *William* (7) *Raſtall.*

(1) Sir *Thomas* was Lord Chief Baron of the court of EXCHEQUER. *Nom.* of *Weſt. hall*, and Pref. thereto. ix. n.

(2) *Eunomus* ſpeaks of theſe Reports as he does of *Show.* Caſ. in Parl. which ſee in this Table.

(3) This Edition was prepared for the preſs, by the compiler of theſe volumes.

(4) See *Fulb.* 28. Pref. to 10 Rep.

It may be an uſeful hint to obſerve, that the *Engliſh* Edition of 1761, of *Plowden's* Commentaries, (which moſt deſervedly bears as high a character, as any book of Reports ever publiſhed in our law) has a great number of additional references, and ſome notes; and that both of theſe are generally very pertinent, and ſhew great induſtry and judgment in the Editor. *Hargr.* Co. *Litt.* 23. *a.* who is ſaid to be the reverend Mr. *Bromley*, parſon of *Fitzroy* chapel, *Tottenham-court-road.* What renders theſe reports more particularly valuable is, that they were compiled principally with a view to the improvement of ſtudents. *Wor. Bibl.* Leg. by *Br.*

(5) The Reporter was an apprentice and ſerjeant at the common law. *Ex. Autog. Camden* gives *Plowden* this character, "In juris Anglicane ſcientiâ, de quâ ſcriptis bene meruit, facile princeps." *Camd. Eliz.* 415. *Nicolſ. Engliſh* Hiſt. Libr. 238. *Plowden* is ſtiled the moſt accurate of all reporters. *Bar.* Obſerv. on ſtat. 1 *Rich.* II.

(6) See *Gr.* Spir. Bank Laws, in this Table.

(7) One of the Juſtices of the *Common Pleas. Cat.* to Biogr. Hiſt of Sir *W. B.* 94. n.

R.

Abbreviations.	Explained.
R. Raym.	Reports by *Robert* (1) *Raymond.*
Raym. or *T. Raym.*	Reports of Caſes in the EXCHEQUER, by Sir *Thomas* (2) *Raymond.*
Rayn. Pref. to Read. on ſtat. *Geo.* II.	Readings on the ſtatutes in the reign of King *George* the *ſecond*, by *John* (3) *Rayner*, quarto Edit. 1775.
Reeves's Engl. Law.	Hiſtory of the *Engliſh* (4) Law, from the *Saxons*, to the end of the reign of *Edward* the *Firſt*; by *John* (5) *Reeves*, Eſq; quarto Edit. 1783.
Reg.	*Regiſtrum* (6) *Brevium* by *William Raſtall.*
Rep. temp. *Finch.*	See *Neſl.* Rep. in this Table.
Rol. Abr.	Abridgment (7) of the Law, by *Henry*

(1) *Raymond* was Attorney and Solicitor General, Juſtice and Chief Juſtice of the King's Bench, one of the Lord's Commiſſioners, and a Peer of the realm. *Gr.* Spir. of Bank. Laws, 29. 30. and n.

(2) Sir *Thomas* was one of the Judges of both benches, and one of the Barons of the EXCHEQUER, *ex Autog.* and father to Lord Chief Juſtice *Raymond.*

(3) The compiler of theſe ſheets.

(4) The ingenious author ſeems perfect maſter of a moſt intricate and obſcure ſubject, and he has communicated his thoughts thereon to the reader, in very elegant terms.

(5) The author is a barriſter at law. *Ex Autog.*

(6) This regiſter of writs, is ſaid to be the moſt ancient book in the law. See Pref. to 8 & 10 Rep. and 3 *Black.* Com. 183, 184.

(7) In this abridgment the more obſolete titles of the law, in the abridgments of Mr. Juſtice *Fitzherbert*, and of Lord Chief Juſtice *Brooke* [See *Br.* and *Fitz.* both in this table] are omitted; but beſides the printed books extant in *Rolle's* time, he abridges many of the parliament rolls, and other authentic records, and it contains a number of caſes, that came under the author's obſervation; which are not to be found in his reports, nor in any other book hitherto printed. *D'Anvers* and *Viner* have both adopted *Rolle's* method and arrangement in their reſpective

Abbreviations	Explained.
	Henry (1) *Rolle.*
Rol. Rep.	The Reports of *Henry* (2) *Rolle.*
Rym. Fœd.	Collection of treaties, acts of ſtate, letters, &c. between the Kings of *England*, and foreign Princes, by *Thomas Rymer*, folio.
S.	
Salk.	Reports (3) of Caſes in the Exchequer &c. by *William* (4) *Salkeld.*
Sav.	Reports (5) of Caſes in the Exchequer, &c. by Sir *John* (6) *Savile.*
S. C.	Same Caſe.

reſpective abridgments. *Wor. Bibl.* by *Br.* This work is excellent in its kind, and in point of method, ſuccinctneſs, legal preciſion, and many other reſpects, fit to be propoſed, as an example for other abridgments of the law. *Hargr. Co. Litt.* 9. a. See Sir *Matthew Hale*'s Pref. to *Rol.* Abr.

(1) Sir *Henry Rolle* was ſeveral years, during the uſurpation, Lord Chief Juſtice of the uſurper's bench. See *Sti.* Rep. 140, and Sir *Matthew Hale* was alſo one of the Juſtices of the *Common Pleas*; *quære* whether both theſe eminent judicial characters were not, by the acceptance of their reſpective commiſſions, under *Oliver Cromwell*, guilty of high treaſon, upon the principles adopted by the court of *King's Bench*, in the caſe of Sir *Henry Vane*. See *Kel.* 15. 2 *St. Tri.* 159. *Foſt.* 402.

(2) The reporter was Serjeant at Law. *Ex Autog.*

(3) The firſt two volumes of theſe Reports were edited by Lord *Hardwicke.*

(4) Serjeant at Law. *Ex Autog.*

(5) See *Cat.* to the Biogr. Hiſt. of Sir *W. B.* 81.

(6) The reporter was one of the Barons of the court of Exchequer. *Ex Autog.* *Cat.* 73, 74.

Sel.

Abbreviations	Explained.
Sel. Caſ. Evid.	A collection of Select (1) Caſes relating to Evidence, by a late (2) Barriſter at Law.
Show. Caſ. in Parl.	Caſes (3) in Parliament, by Sir *Bar-*

(1) Many of theſe caſes, which were ſuppreſſed ſoon after publication, are in the Reports of Sir *John Strange*. See *Wor. Bibl. Leg.* by *Br.*

(2) Sir *John Strange*, King's Counſel, Solicitor General, Recorder of *London*, and Maſter of the Rolls.

(3) Theſe "Caſes in Parliament," which are highly eſteemed by the gentlemen of the long robe, gained Sir *Bartholomew Shower* univerſal admiration, and will do him eternal honour. The language of them is ſo pure, and the matter ſo intereſting, that they have increaſed the character and conſequence of the author of them, to ſuch a degree, as to make it almoſt impoſſible for him, to add to his reputation in *Weſtminſter-hall*. See *Hickeſ. D. E.* p. 2. Sir *Bartholomew* ſignified to Doctor *Hickes*, that he intended to publiſh a ſecond part of the "Caſes in Parliament." See *Hickes's* dedication of the *D. E.* to Counſellor *Lawton*. Theſe Caſes may be conſidered in another point of view, to what Reports are in general, and rather out of the direct tract of the profeſſion, as they contain excellent pieces of legal reaſoning, and which are capable of entertaining any one of a liberal education, with the ſmalleſt inſight into ſuch ſubjects. *Eunom.* 3 *Dial.* 182. Sir *Bartholomew Shower* juſtified the laws of the kingdom, and the *Engliſh* judges; as alſo the practice of courts of criminal juriſdiction, reſpecting capital offences, in a work intituled, The Magiſtracy and Government of *England* vindicated, *&c.* See 3 *St. Tri.* 765. Theſe Sir *B.* defended in a maſterly a manner, and in oppoſition to a ſet of men of the moſt violent diſpoſitions. See 3 *St. Tri.* 755, 784. *Hickeſ. D. E.* 95. However, his enemies, and who were alſo thoſe of truth, were, by this publication, ſilenced, and that too, from their inability to anſwer his arguments, as it may be preſumed, ſince they never attempted to reply for ten years together. *Hickeſ. D. E.* 61. The books Sir *B.* publiſhed in his life-time, are ſufficient proofs of his knowledge

Abbreviations	Explained.
	Bartholomew (1) *Shower.*
Show. Rep.	Reports (2) by the ſame author. *Sid.*

ledge in his profeſſion. He intended to have wrote, if it had pleaſed God to have prolonged his days, beſides a ſecond part of "Caſes in Parliament," as before obſerved, according to what he ſignified to Doctor *Hickes*, a treatiſe on the criminal or crown law; for the compiling of which, he had not only collected the neceſſary materials, but had alſo actually begun the work, at his intervals of leiſure, from the duties of his profeſſion, and the ſenate. *Hickes*'s Dedication of the *D. E.*

(1) Sir *Bartholomew* was King's Counſel, and Recorder of *London*, 3 *Mod.* 191. He had the character of being a moſt able lawyer, an animated and nervous orator, a fortunate and ſucceſsful advocate, as fully appeared to all ſuch, as frequented the courts of juſtice; eſpecially his clients, whom he made ſenſible of his abilities, by their experience of the advantage they reaped, from his management of their cauſes. It is ſuperfluous to add, how dear he was to his friends, and how much reſpected by his fellow citizens of *Exeter*, of which city he had been three years Recorder, and alſo ſerved in the Houſe of Commons. His ſweetneſs of temper, his morality in life, his humanity and benevolence, and, what is deemed the parent of almoſt all reſplendent virtues, a Chriſtian contempt for riches, which I will not ſay he liberally beſtowed, but honeſtly laviſhed; theſe qualities ſecured him the good will and eſteem of all mankind. *Hickes*'s Dedication of *D. E.* Sir *B. S.* had the honour of being one of the firſt gentlemen of the long robe, aſſigned of counſel for priſoners, charged with treaſon in in purſuance of ſtat. 7 *Wil.* III. chap. 3. — 4 *St. Tri.* 663. It is preſumed the compiler need make no apology for the length of the notes reſpecting Sir *B. S.* though they may be conſidered by ſome as rather a digreſſion; inaſmuch as a very illuſtrious character of *Weſtminſter-hall*, is hereby, it is hoped, in ſome meaſure reſcued from that oblivion, whereto his fame was nearly conſigned, from his character being recorded in a dead language, and in a very ſcarce book. For more concerning Sir *B. S.* ſee *Hickeſ. D. E.* 10. 2 *Show.* Rep. 283, 466. 8 *St. Tri.* 464. 9 *St. Tri.* 313.

(2) The *ſecond* volume of theſe Reports, is *firſt* in point of time. *Wor. Bibl.* by *Br.* The late Lord Chief Baron *Parker* cites, and ſeems to

Abbreviations	Explained.
Sid.	Reports (1) of Caſes, by *Thomas Siderfin.*
Skin.	Reports of Caſes, by *Robert Skinner.*
S. P.	Same page, or ſame point.
Spelm.	*Henrici Spelmanni* Equit. Anglo. Brit. Orchœologus, in Modum Gloſſarii, folio edit. 1626.
S. T.	Same Term.
Steph. Let. and Mem. of *Bac.*	LETTERS of Sir FRANCIS BACON, Baron of *Verulam*, &c. with MEMOIRS, by *Robert* (2) *Stephens*, quarto, edit. 1702.
S. T. P.	*Sacræ Theologiæ Profeſſor.*
St. Tr.	The State Trials, folio edit. (3) 1781.
Stra.	Reports (4) of Caſes, by Sir *John* (5) *Strange.*
Sty.	Reports in the *Upper* (6) *Bench*, by *William Style.*

to rely on them, as books of authority. See *Park.* Rep. 126, 127, 128. *Gr.* Sp. Bank. Laws, 127, 128. n.

(1) The *ſecond* part is *firſt* in point of time, *Wor.* Bibl. Leg. by *Br.*

(2) See the Pref. to them.

(3) The Chronological Table and Index, were both compiled by the author of theſe volumes. *J. R.*

(4) For an account of theſe Reports, ſee 11 St. Tr. 206, 221, 233, 235. wherein the reader will find the Attorney General (*James Wallace*) his character and defence of them. This edition was prepared for the preſs, by the compiler of this work.

(5) The Collector was Maſter of the Rolls, *Ex Autog.* See Sel. Caſ. of Evid. in this table.

(6) Theſe reports are ſingularly valuable, from the circumſtance of being the only caſes extant of the common law courts, in the time of the uſurpation, during which, *Henry Rolle*, [ſee *Sty.* Rep. 140.] and afterwards *John Glynn*, [ſee *Sty.* Rep. 452.] ſat as Chief Juſtices of the *Upper Bench*, *Wor.* Bibl. Leg. by *Br.* ſee *Rol.* Abr. in this table.

T

T.

Abbreviations	Explained.
T.	*Trinity* Term.
Theo. Evid.	Theory (1) of Evidence, octavo.
Theſaurus.	Linguarum vet. (2) Septentrionalium Theſaurus, auctore *Georgio Hickeſio*, S. T. P. folio, *Oxon.* edit. 1703.
Toth.	Tranſactions (3) of the court of *Chancery*, by *William* (4) *Tothil*, 12mo.
T. Raym.	See *Raym. T.*
Truſl. Hog. mor.	The Works of Mr. *William Hogarth* moralized, by *John Truſler*, octavo.
Tyr. Hiſt. *Engl.*	The (5) General Hiſtory of *England*, by *James* (6) *Tyrrel*, Eſq; folio.

(1) This is engrafted in *Bul. Ni. Pri.* ſee 3 *Black.* Com. 367. n.

(2) The learned Doctor *Hickes* has wrote a large volume, which he calls "*Theſaurus Linguarum veterum Septentrionalium*," containing not only complete grammars, but a treatiſe alſo of the *northern* languages. This book, I may with juſtice ſay, has the reputation among the learned, of being one of the moſt curious, exact, and moſt learned pieces, in its kind, that any age has produced, *Forteſcue's* Pref. to Mon. lxxx. lxxxi. The *Theſaurus* is a very ſcarce book, Pref. to *Forteſcue* de Laud. Leg. Angl. xviii.

(3) Theſe are cited as *Tothil's* Reports; there are two editions, one printed in 1649, and the other in 1671; the tranſactions or caſes are placed at the beginning of the book, in the former edition, and at the end of it in the latter, ſee Wor. Bibl. Leg. by. *Br.*

(4) The Collector was one of the Six Clerks. *Ex Autog.*

(5) The Prefaces and Introductions to this Hiſtory are laboured and curious. Pref. to *Forteſ. de Laud.* xix. See *Nicol. Engl.* Hiſtor. Libr. 74. This Hiſtory is rendered peculiarly intereſting to the profeſſion, from the author's having ſubjoined to every reign, the titles of the ſeveral ſtatutes reſpectively paſſed therein.

(6) Mr. *Tyrrel* ought to be mentioned with honour, as he was a ſincere lover of truth and liberty. Pref. &c. xviii.

V.

Abbreviations	Explained.
Vern.	Caſes (1) in *Chancery*, by *Thomas Vernon.*
Vez. Rep.	Caſes in *Chancery*, by *Francis* (2) *Vezey.*
Vin. Abr.	Abridgment (3) of Law and Equity, by *Charles* (4) *Viner.*

W.

Ward's MSS.	Reports (5) of Caſes in the court of *Exchequer*, by Sir *Edward* (6) *Ward.*

(1) Theſe caſes were publiſhed by order of the court of *Chancery*, Wor. Bibl. Leg. by *Br.*

(2) The reporter was one of the Maſters in *Chancery* in *Ireland*, p. 411.

(3) This abridgment is an immenſe body of law and equity, and, notwithſtanding all its defects and inaccuracies, muſt be allowed to be a neceſſary part of every lawyer's library, and is indeed a moſt uſeful compilation, and would have been infinitely more ſo, if the author had been leſs ſingular, and more nice in his arrangement and method, and more ſtudious of avoiding repetition; theſe faults in a great meaſure proceed from the author's error in judgment, in endeavouring to engraft his own very extenſive abridgment on that of Mr. Serjeant *Rolle*, *Hargr. Co. Lit.* 9. a. Lord Chancellor *Camden* is ſaid to have oftentimes expreſſed himſelf much in commendation of this abridgment. It is a public loſs, that the univerſity of *Oxford* does not continue this abridgment; for I am informed, that they are both enabled and directed by the teſtator ſo to do, at proper intervals of time. See Extract from Mr. *Viner*'s Will, given in Poſtſcript to *Black.* Diſc.

(4) This very laborious compiler of the law, ſee 11 St. Tr. 206. Col. 2. has ſhortened the hours of labour of the lawyers, eſpecially thoſe in great buſineſs, 11 St. Tr. 235. col. 1. ſee 1 *Black.* Com. 4, 27, 28. *Gatz.* 79. n.

(5) See p. 361.

(6) Sir *Edward* was Attorney General, and Lord Chief Baron of the court of EXCHEQUER.

Watſ.

Abbreviations	Explained.
Watſ.	Clergyman's Law, or Complete Incumbent, by *William* (1) *Watſon*, folio edit. 1747.
W. B.	*William Blackſtone.*
Wilk. Leg. Anglo-ſax.	*Leges* (2) *Anglo-Saxonicæ*, by *David Wilkins.*
Willis.	The Nature of Agiſtment Tithes of unprofitable Stock, as decreed in the Court of EXCHEQUER, by (3) *Cecil Willis*, D. D. quarto edit. 1778.
Wilſ. Rep.	Reports of Caſes, by *George* (4) *Wilſon.*
Wor. Bibl. Leg. by *Br.*	*Bibliotheca* (5) *Legum*, or Catalogue of Law Books, by *John Worral* and *Edward Brooke*, 24mo, edit. 1782.
Wyn. Miſcel.	(6) Miſcellany, containing ſeveral law (7) tracts, *octavo*, 1765.
—— Serj. at Law.	Obſervations (8) touching the Antiquity and Dignity of the Degree of Serjeant at Law, by *William*

(1) See Introd. xxii. n.

(2) Biſhop *Kennet* very highly commends this work, in his life of *Sumner*, annexed to his treatiſe of gavelkind, quarto, 1726, *Wor.* Bibl. Leg. p. 57.

(3) Doctor of Divinity, Vicar of *Holbeach*, and Prebendary of the cathedral church of *Lincoln*. *Ex Autog.*

(4) The Collector was a Serjeant at Law, ſee *Nomen. Weſtm.* Hall.

(5) See *Gatſ.* 59. n.

(6) This miſcellany was not publiſhed for ſale, a very few copies only having been printed for particular friends. *Wor.* Bibl. by *Br.* Tit. "Miſcellanies."

(7) They are ſeven in number, the contents of them are particularized in *Wor. Bibl. Leg. ut ſupra.*

(8) See 3 *Blank.* Com. 27. n. Cat. 11. n.

Y.

Abbreviations	Explained.
Yelv.	*William* (1) *Wynne*, octavo, 1765. Reports (2) of Cases by Sir *Henry* (3) *Yelverton.*

(1) The author was a Serjeant at Law, see *Nem. Weſtm.* Hall.

(2) See Cat. 99. n.

(3) The Reporter was Attorney General, and afterwards the *fifth puiſne* Juſtice of the court of *Common Pleas*, *Ex Autog.* See Cat. 97. n. 98. n. 99, 100.

ERRATA.

ERRATA.

*** *The compiler declines endeavouring to get rid of the number* (1) *of miſtakes, that have occurred to him, in a careful peruſal of theſe volumes, by imputing them to the printer, or by informing his readers, that he was at a great diſtance from the preſs; becauſe the apology, in his opinion, is inexcuſeable, as it is generally falſe; but if not, ſuch evaſive ſubterfuges, certainly ſhew very little reſpect, either in the one caſe, or the other, to the public; of ſuch pretences therefore the compiler will not avail himſelf, but candidly acknowledge, they proceed from the fallibility, which is the natural infirmity of human nature; and he chearfully relies on this conſideration, as the only one, that ought to induce a reaſonable, or conſcientious writer, to expect indulgence; obſerving at the ſame time, that the rectifying the work by this* memorandum, *may not be time entirely loſt to the ſtudents, in the profeſſion of the law.*

VOLUME THE FIRST,

PREFACE.

Page iv. line 4. *for* was *read* found himſelf.—In notes *after*, &c. *add* and Authorities.—l. 5. *for* obliged to act *read* acting.—p. viii. l. 15. *for* much more *read* moſt.—l. 23. *for* defend *read* aſſert.—p. xvii. l. 4. *after* other; *add* alſo.—l. 12. *for* this *read* the chronological.—l. 16. *dele* chronological.—p. xxii. l. 29. *for* in all probability *read* perhaps.

INTRODUCTION.

Page ii. l. 7. *for* precept *read* precepts.—l. 14. *for* comfort *read* benefit.—In note (3) *add* Numb. xviii. 28. Deuter. xiv. 22. See Deuter. xiv. 23, 28.—p. iii. l. 17. *for* maſters *read* ſenators.—p. iv. l. 5. *for* kind *read* a kind.—p. vi. l. 12. *for* incloſures *read* inſtance.—p. x. l. 23. *for* ſet *read* ſet out.—p. xxvii. l. 29. *for* vicarage *read* vicarages.—p. xli. l. 8. *dele*, under a lord.—p. xliv. n. (6) *dele* Archbiſhop of *York*, &c.—p. xlv. n. (1) *add* Archbiſhop of *York*, &c.—p. lvi. n. (6) *for* learning *read* learning.—p. lxv. n. (2) l. 3. *after* law: *add* would lie.—lxvii. n. (1) l. 3. *after* keeper *add* or firſt lord commiſſioner.—p. lxxxii. n. (2) *for* ſtat. chap. *read* ſtat. 2. chap.—xcii. n. (2) *after* chap. *add* 20.—p. cxx. l. 15. *for* purchaſers *read* purchaſes.—p. cxxx. l. 21. *after* charges *add* partly.—*after* not *read* wholly for.—l. 22. *dele* however.—p. cxxxv. l. 18. *for* to repreſent *read* repreſenting.

(1) See Pref. xvii.

AUTHO-

ERRATA.

AUTHORITIES.

Page. v. n. † *for* addition *read* edition.—p. viii. n. (3) *for* Societé Antiquites *read* Societé des Antiquites.—p. xi. n. (1) *for* order *read* orders,—xvii. n. (2) *for* cafe *read* law.—p. xxii. l. 6. 7. *for* law *read* Lane.

THE CASES.

Page 5. l. 15. *for* B. R. *read* C. B.—p. 6. l. 15. *for* B. R. *read* C. B.—p. 12. l. 13. *add* Eafter Term.—p. 14. l. 19. *for* 50 Edw. III. *read* 45 Edw. III. chap. 3.—p. 17. l. 15. *add* Gawie v. Lake, knight, p. 19. l. 13. *for* Webb *read* Keble.—p. 20. l. 4. *for* Richard *read* Robert.—l. 5. *for* Aſh *read* Aſk.—p. 25. l. 12. *for* cap. 4. *read* cap. 2.—p. 39. l. 6. *dele* Clemens Spelman.—p. 64. l. 8. *for* Chancery *read* Exchequer.—p. 74. l. 16. *for* vicar *read* leſſee.—p. 81. l. 5. *for* Turton *read* Blencowe.—p. 82. l. 9. *for* Ellis *read* Elliot.—p. 91. n. *after* and *inſert* hemp.—p. 94. marg. *for* tueſalls *read* teaſalls.—p. 109. marg. *for* 24 *read* 241.—p. 114. l. 15. *for* bills *read* title.—p. 126. title page, *add* Hilary.—p. 127. title page, *dele* Eaſter.—p. 145. l. 9. *for* chap. 6. *read* chap. 13.—l. 22. *for* chap. 6. *read* chap. 13.—p. 159. marg. *for* hnd *read* find.—p. 161. marg. *for* of *read* for.—p. 162. l. 17. *for* are *read* is.—p. 177. marg. *for* mend *read* amend.—p. 187. n. *for* Mod. *read* Mad.—p. 193. marg. *for* pral *read* parl.—p. 198. marg. *for* chap. 1. *read* chap. 11.—p. 204. marg. *for* chap. 1. *read* chap. 11.—p. 206. marg. *for* 170 *read* 169.—p. 216. marg. *for* 115 *read* 125.—p. 238. l. 3. *for* Atkinſon, *&c. read* Anon.—l. 9. *add* Atkinſon, *&c.*—p. 256. marg. *for* K. *read* R.—p. 269. marg. *for* ten *read* four.—p. 273. marg. *for* on *read* or.—282. marg. *for* on *read* to.

THE SECOND VOLUME.

Page 330, laſt line *after* Geo. II. *add* in the ſupplement.—p. 334. l. 8. *add* Coleman and Barker, E. 12 Geo. 1. ante p. 222, 223, cited for the plaintiff.—p. 338. marg. *for* admitted *read* omitted.—p. 354. l. 3. *dele* ".—p. 354. l. 7. *add* ".—p. 355. l. 17. *for* Wilbraher *read* Wilbraham.—p. 371. l. 4. *for* decimando *read* decimandi.—*for* Coke *read* Choke.—p. 396. n. *for* xxvli *read* xxvii.—p. 420. l. 3. *for* Charter-houſe *read* Chapter-houſe.—p. 421. l. 9. *for* Carter *read* Carte.—p. 429. l. 14. *for* form *read* farm.—p. 430. marg. *for* Carter *read* Carte.—p. 452. l. 13. *after* Edw. III. *add* chap. 3.—p. 465. l. 6, 7. *tranſpoſe the title of the cauſe.*—p. 467. l. 3. *for* Walton and Tyers *read* Tyres and Walton.—p. 475. l. 8. *for* hopes *read* hops.—p. 499. l. 4. *for* Smith *read* Sims.—p. 501. l. 2. *after* Eaſtham *add* and all it's appurtenances.—l. 8. *dele* and all its appurtenances.—p. 502. l. 11. *after* time *inſert* being.—p. 519. l. 18, 19. *for* Term Geo. *read* Michaelmas Term 1 Geo. III.—p. 565. marg. *for* 13 Eliz. chap. 9. *read* 43 Eliz. chap. 9.—p. 583. l. 12. *dele* to time.—p. 637. l. 12. *for* overruled it *read* ordered.—p. 638. n. *for* cauſe *read* caſe.—p. 697. l. 33. *for* Hugo

ERRATA.

Hugo *read* Hugh.—p. 703. l. 10. *after* one *add* in.—p. 715. n. 14. *for* on *read* to.—p. 842. n. *dele* Weſt Tythery, Chigwell, Burton.—*for* Brideh *read* Bridges.—*after* poſt *add* 938, 939.—p. 845. marg. *after* at *add* his.—p. 847. l. 5. *for* Davie *read* Devie.—p. 879. l. 15. *add* For the Appendix to the appellant's caſe, ſee p. 883.

THE THIRD VOLUME.

Page 930. l. 13. *for* 1774 *read* 1747.—p. 938. n. *dele Ekins* v. *Bridges*, in 1703.—991. *add* in the next page.—p. 1011. l. 20. *for* 1771 *read* 1781.—p. 1017. n. *for* it is not rather improperly *read* would not preſuming be rather more properly.—1074. marg. *for* Baldum *read* Bladum.

SUPPLEMENT.

Page 1091. l. 10. *for* Exchequer *read* Houſe of Lords.—p. 1112. marg. *for* Eliz. *read* 43 Eliz.—p. 1137. in title page, *for* 27 Geo. II. *read* 26 Geo. II. in n. *for* Hilary *read* Eaſter.—p. 1138. l. 15. *for* 27 Geo. *read* II. 26 Geo. II.

APPENDIX.

Page 1140. n. *for* Bok. *read* Boh.—p. 1156. marg. *for* 4, *read* chap. 4. *for* 22 *read* chap. 22.—p. 1251. marg. *for* to *read* ſo.—p. 1255. l. 26. *for* or *read* of.—p. 1257. marg. *for* 13 Ed. 1. 5. 9 Ed 2. 13 Ed. 1. 45. Ed. 3. 3. 1 Ed. 3. 11. *read* 1 Edw. 3. chap. 10. 9 Edw. 2. ſt. 1. 45 Edw. 3. chap. 3. 13 Edw. 1. ſtat. 4.—p. 1261. l. 28. *dele* chap. 28.—p. 1269. marg. *for* obſervations *read* reſervations.—p. 1307. n. 21. *for* changes *read* ſtrangers.

A COMPLETE

COLLECTION

OF

CASES

CONCERNING

TITHES.

17 Eliz. A. D. 1575.

In *Chancery.*

Sir *Nicholas Bacon*, Lord Keeper,
Sir *William Cordell*, Maſter of the Rolls,
and
Thomas Bron , Solicitor-General.

Windham againſt *Norris.*

A DEMURRER, becauſe the matter concerneth tithes, over-ruled, and ordered.

Chancery hath juriſdiction of tithes. *Toth.* 283.

Eaſter Term, 22 Eliz. A. D. 1580.

In the *Exchequer.*

Roger Manwood, Lord Chief Baron,
John Sotherton, *puiſ-né* Baron.
Robert Shute, *puiſ-né* Baron.
Gilbert Gerrard, Attorney-General.
William Fleetwood, Recorder of *London*.

The Caſe of the Archbiſhop of York.

The demand of tithes, under ſtat. 26 Hen. VIII. chap. 3. ought to be made at the *dignitary* or church, *i. e.* at the manſion-houſe of the prebend, or elſe at his ſtall in the choir. *Sav.* 1. pl. 2.

THE archbiſhop of *York* certifies *John Young*, now biſhop of *Rocheſter*, and prebendary of in the cathedral church of *York*, (which prebend is in the county of *Nottingham)* to be recuſant as to payment of his tithes for a year. *Richard Francklyn* his ſolicitor demands tithes, and does not pay them to him; and, among the certificates of other recuſants, it appears, that one *Thomas Wethered*, the ſaid *Richard Francklyn*'s deputy, demanded them at the ſaid cathedral church, and the words of the ſtatute are, "by the archbiſhop, biſhop, or by any of their miniſters, ſervants, or officers," &c.

And it was held, by *Manwood*, chief baron, and *Shute*, ſecond baron of the *Exchequer*, that the certificate is not good, that a certificate under a ſeal of arms is; that the demand was made by *Richard Francklyn*, and the ſchedule is, that the demand was by the ſub-collector; and the ſtatute runs, "*that it ſhall be reaſonably demanded*:" beſides, they do not certify where the demand was made; and by the expreſs words of the ſtatute of 26 *Hen. VIII. chap.* 3. "the demand ought to be made at his *dignitary* or church,"

church," and this ſhould be at the manſion-houſe of the prebend, or elſe at his ſtall, in the choir; and beſides the certificate is, "*In teſtimony whereof we have affixed the ſeal of our vicarage in ſpiritualities,*" and in fact it was ſealed with the ſeal of the archbiſhop's arms; whereas the words of the ſtatute are, "*and certified under the ſeals of the archbiſhop or biſhop, or ſuch as ſhall be charged with the collection of the tenth.*"

See the caſe of the biſhop of *Coventry* and *Litchfield*, and *Beacon*, under *Eaſter* Term, 24 *Eliz.*

Michaelmas Term, 23 Eliz.

November 4, A. D. 1581.

In the *Exchequer.*

The Caſe of the Abbot of Saint Mary, *in* Yorkſhire.

THE abbot of Saint *Mary*'s in *York* challenges tithes of the lands of *Torbay* in the towns of *Dalſton* and *Burgh*, that is to ſay, that a compoſition was made in ancient times, between the convents of both abbies, with the mediation of the abbots, that the abbot of *Torbay*, &c. ſhould pay for tithes to the aforeſaid abbot of Saint *Mary*'s, &c. twenty-ſix ſhillings and eight-pence; and afterwards both the abbies came into the king's hands.

It is reaſonable, that every one pay his portion of tithes. *Sav.* 4. pl. 12.

Henry the *Eighth* by his letters patent granted the lands that belonged to the abbey of *Torbay*, ſince which proceſs iſſued out of the *Exchequer*, againſt the patentees, who came by *Walmſley*, Serjeant, and

prayed to be diſcharged therefrom, becauſe the lands charged, and the abbey of Saint *Mary*'s, were both in the king's hands, and therefore the unity of poſſeſſion extinguiſhed them.

Manwood. No, for this payment is granted for tithes, ſo that if the money be withheld, the tithes are payable.

Tithes do not iſſue out of land, as rent.

Shute, agreed, and ſaid beſides, that the grant is executory, and that a tacit condition is implied, that if the money be not paid, the party may take the tithes; and that this caſe is not like that of rent in chief, common, and ſuch like, that are merely iſſuing out of the land; to which *Manwood* agreed.

Shute. What ſort of an agreement is that, which is made by the mediation of the abbots of the convent!

Manwood. Where it was by the mediation of the abbots, this was good in thoſe days.

Walmſley prayed, that inaſmuch as his client had ſolely the lands in *Burgh*, that it ſhould be apportioned.

Court. It is reaſonable that every one ſhould pay only his portion; wherefore an auditor was aſſigned, to make an apportionment.

Eaſter

Eaſter Term, 23 Eliz.
April 13, A. D. 1581.

In the *Exchequer Chamber.*

Sir *Chriſtopher Wray*, Lord Chief Juſtice of *England*,

Sir *Edmund Anderſon*, Lord Chief Juſtice, *C. B.*
Roger Manwood, Lord Chief Baron,
John Southcote, *puiſ-né* J. B. R.
Thomas Carrus, *puiſ-né* J. B. R.
Thomas Gawdey, *puiſ-né* J. B. R.
Thomas Mead, *puiſ-né* J. C. B.
Francis Windham, *puiſ-né* J. C. B.
John Sotherton, *puiſ-né* Baron.
Robert Shute, *puiſ-né* Baron.
William Periam, *puiſ-né* J. B. R.
John Clinch, *puiſ-né* Baron.

Flemyng, and the tenants of *Dudley*.

When you may or may not preſcribe in *modo decimandi*. *Sav.* 13. pl. 34.

IT was held between *Flemyng* and the tenants of *Dudley*, that if the tenants, from time whereof memory does not run, &c. have been uſed to pay a certain price for a tithe lamb, ſo that the cuſtom is fully eſtabliſhed, that although afterwards the parſon encroaches upon more, or the tenant pays the lamb in *kind*, this does not deſtroy the cuſtom. But if one had paid a penny for a lamb for fifty years; and afterwards pays tithe in kind, before the cuſtom is eſtabliſhed; although he again pays his penny for twenty years, they cannot preſcribe in *modo decimandi*.

Eaſter Term, 24 Eliz.

May 17, A. D. 1582.

In the *Exchequer Chamber.*

Sir *Chriſtopher Wray*, Lord Chief Juſtice of *England.*

Sir *James Dyer*, Lord Chief Juſtice, *C. B.*

Roger Manwood, Lord Chief Baron.

John Southcote, *puiſ-né* J. B. R.

Thomas Carrus, *puiſ-né*, J. B. R.

Thomas Gawdey, *puiſ-né* J. B. R.

Thomas Mead, *puiſ-né* J. C. B.

Francis Windham, *puiſ-né* J. C. B.

John Sotherton, *puiſ-né* Baron.

Robert Shute, *puiſ-né* Baron.

William Periam, *puiſ-né* J. B. R.

John Clinch, *puiſ-né* Baron.

The Biſhop of *Coventry* and *Litchfield* and *Beacon.*

Certificate of a prebendary's recuſancy, after the payment of his tithes, and before the time in 26 Hen. VIII. chap. 3. is of no avail. *Sav.* 26. pl. 63.

IT was held, that if a prebendary pays his tithes into the receipt of the *Exchequer*, before the time limited in the ſtatute of 26 *Hen.* VIII. chap. 3. and the biſhop of the dioceſe afterwards certifies him a *recuſant*, that this certificate is of no force.

See the archbiſhop of *York*'s caſe, under *Eaſter* Term, 22 *Eliz.*

Trinity

Trinity Term, 24 Eliz. A. D. 1582.

In the *Exchequer*.

Mayne againſt *Becke*.

ONE *Mayne* ſued *Becke* in the ſpiritual court, for tithes of the manor of *B.* in the county of *Bucks*; and *Becke* exhibited an *Engliſh* bill, ſetting forth, that he was tenant for years on the demiſe of the queen, and alledged that the ſaid manor was diſcharged from tithes, and prayed a prohibition, which was granted; and afterwards the ſame *Mayne* came, and prayed ſequeſtration of the tithes of the ſaid manor.

Sequeſtration to ſet out tithes never ſeen. *Sav.* 30. pl. 61.

Manwood. Had the contention been between the parties to whom the tithes of the manor, ſevered from the ninth part, belonged, your requeſt had been reaſonable; but to grant a ſequeſtration for the ſetting out of the tithes, was never hitherto ſeen; and if the defendant agrees to this, he admits that the lands are titheable. *Shute* agreed.

Michaelmas Term, 25 Eliz. A. D. 1583.

In the *Exchequer Chamber*.

Beake and *Mayne*.

THE ſame was held for law in this caſe, as in that of *Flemyng*, and the tenants of *Dudley*, [which ſee under *Eaſter* Term, 23 *Eliz.*] for tithes

Preſcription for tithes. *Sav.* 13. pl. 34.

claimed by the farmer of the parſonage of *Haddingham*, in the county of *Bucks*.

Trinity Term, 26 Eliz.

May 7, A. D. 1584.

In the *Exchequer*.

Roger Manwood, Lord Chief Baron,
John Sotherton, *puiſ-né* Baron.
Robert Shute, *puiſ-né* Baron.
Edward Flowerdue, *puiſ-né* Baron.

John Popham, Attorney-General,
William Fleetwood, Recorder of *London*.

Anon.

Where the pariſh is not certainly known, and where no uſage of payment has been, the tithes ſhall be paid to the parſon, or vicar, &c. *Sav.* 60. pl. 131.

THERE is a fenn called *Wildmore*, in the county of *Lincoln*, which fenn is not known to lie in any particular pariſh; whereupon it was ordered in this court, that the tithes in this caſe ſhould be paid to the parſon, vicar, penſionary, &c. where the owner of the cattle lives; but if the tithes have been paid to the parſon of any pariſh, beyond time of memory, although it be not known in which pariſh the moor or common is, they ſhall be continued to be paid in the ſaid pariſh, where they have been uſed to be paid; but where no uſage of payment hath been heretofore, nor the pariſh certainly known, they ſhall be paid to the parſon or vicar, where the owner reſides, by virtue of a proviſoe in the ſtatute paſſed in 2 & 3 *Edw.* VI. chap. 13.

2 & 3 *Edw.* VI. chap. 13.

Trinity Term, 34 Eliz. A. D. 1592.

In *Chancery*.

Sir *John Puckering*, Lord Keeper,
Sir *Gilbert Gerrard*, Maſter of the Rolls,
Edward Coke, Solicitor General.

Moone againſt *Bond*.

MY Lord declares, that matters for tithes are determinable in this court.

Tithes determinable in *Chancery*. *Toth.* 282. pl. 162.

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10 Jac. I. A. D. 1612.

In *Chancery*.

Thomas, Baron *Elleſmere*, Lord Chancellor,
Edward Bruce, Maſter of the Rolls,
Thomas Fleming, Solicitor General.

Southby againſt *Moore*.

EVERY one muſt pay their tithes in kind, unleſs there be a compoſition real, or good preſcription in *modo decimandi*.

Tithes to be paid in kind, unleſs compoſition, or preſcription. *Toth.* 284.

Trinity

Trinity Term, 11 Jac. I.
June, A. D. 1613.

In *Chancery*.

The Dean and Chapter of *Chriſt* Church, in *Oxford*, againſt *Grant*.

Tithes determinable in *Chancery*. *Tab.* 283.

POINT of tithe determinable in this court, and parcel or not parcel.

Browne againſt *Whetford*.

Modus decimandi, not being performed, diſmiſſed. *Tab.* 283.

A *Modus decimandi* diſmiſſed, otherwiſe, *if* performed.

Hilary Term, 11 Jac. I. A. D. 1613.

In *Chancery*.

Hungate againſt *Crooke*.

Ground ordered to be ſet out by commiſſion, in lieu of tithes in kind. *Tab.* 283.

THE plaintiff being a common perſon, having a leaſe of tithes in kind, which had long time been obſcured by union, or otherwiſe; Ordered, That a commiſſion ſhould go forth, for ſetting out meadow, and other grounds, in lieu thereof.

Michaelmas

Michaelmas Term, 18 Jac. I.
A. D. 1620.

In *Chancery.*

Sir *Julius Cæſar*, Maſter of the Rolls; Sir *Edward Bromley*, one of the Barons of the *Exchequer*; Sir *Humphry Winch*, one of the Juſtices of the *Common Bench*; Sir *John Doderidge*, one of the Juſtices of the *King's Bench*; and Sir *Richard Hutton*, one other of the Juſtices of the ſaid Court of *Common Bench*, &c. Lords Commiſſioners, to hear and determine Cauſes, in *Chancery.*

Henry Yelverton, Solicitor General.

Underhill againſt *Joyner.*

CONCERNING tithes in kind, and the parſon having common for beaſts of the field, was ordered to take a quantity of ground in lieu thereof, and concerning an act of parliament; decreed upon a report.

Parſon decreed upon a report, to take a quantity of ground in lieu of tithes in kind. *Toth.* 283.

3 Car. I. A. D. 1627.

In *Chancery.*

Sir *Thomas Coventry*, Lord Keeper,
Sir *Julius Cæſar*, Maſter of the Rolls,
Richard Shilton, Solicitor General.

Yate againſt *Southby.*

Chancery refuſed to reverſe a decree for tithes. 1 Chanc. Rep. 26.

A BILL of review brought to reverſe a decree for tithes made by the Lord *Elleſmere*, in reſpect the plaintiff hath had a verdict at law, and ſentence in the eccleſiaſtical court, ſince the decree; this court would not reverſe the decree, notwithſtanding any thing urged againſt it.

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4 Car. I. 1628.

In *Chancery.*

Browne againſt *Thetford.*

Demurrer to bill for the preſcription of a *Modus decimandi*, allowed. 1 Chanc. Rep. 27. But *quære*, and ſee *ante*, p. and *poſt*, p.

THE bill is to maintain the preſcription of a *Modus decimandi*, to which bill the defendant demurred, and ſays it is proper for the common law, or the eccleſiaſtical court; this court allowed the demurrer, and diſmiſſed the bill. But note the time, &c. ſuch bills having been often allowed, both before and ſince.

Trinity

Trinity Term, 4 Car. I.
A. D. 1628.

In the *Exchequer*.

Sir *John Walter*, Lord Chief Baron,
John Denham, *puiſ-nè* Baron.
Sir *Thomas Trevor*, *puiſ-nè* Baron.
George Vernon, *puiſ-nè* Baron.

Robert Heath, Attorney General.
Heneage Finch, Recorder of *London*.

Doctor *Burgeſs's* Caſe;
OR,
Doctor *Burgeſs* againſt *Symons*.

DOCTOR *Burgeſs*, parſon of Saint *Magnus* upon *London* Bridge, ſued here, upon the decree confirmed by the act of parliament, of 37 *Hen. VIII.* chap. 12. concerning tithe in *London*, for tithes; and for privilege, ſhews, that the King has four nobles a year revenue out of it, and a demurrer to the juriſdiction; and for the doctor, precedents were alledged; one of 14 *Jac. I.* where the parſon of Saint *Buttolph's* without *Biſhopſgate*, being impropriator upon a grant in fee farm, ſues here; *Coventry* being Recorder at this time, of counſel with the againſt the parſon.

Of ſuing for tithes upon the decree confirmed by ſtat. 37 *Hen. VIII.* chap. 12. reſpecting tithes in *London*. *Littl.* Rep. 102.

Finch, Recorder. Thoſe precedents might be of tithes claimed by cuſtom; and for ſuch, they may well ſue here, or in court chriſtian; but for tithes grounded on the ſtatute, or which have their commencement from

from the ſtatute, and *not otherwiſe*, they ought not to be ſued by any other method, than that which the ſtatute directs, nor before any other judge, than appointed by the ſtatute; and as for tithes for houſes, there are none, unleſs the ſame be given by this decree, any more than there were tithes payable for a mill, before the ſtatute of *Articuli Cleri*; but new-erected mills pay tithes; for no tithes are due for freeholds by common law, and therefore at common law, wood and underwood were titheable, though, before the ſeverance, it was patcel of the freehold, and ſo ſays *Doctor and Student*.

And it appears alſo by a record, which I have ſeen, of 2 *Rich.* II. among the parliament rolls, whereby the Commons pray, that wood may be aſcertained, for they ſay that before the great plague, no tithe was paid for any ſort of wood; but this was altered by the ſtatute of *ſilva cædua*, 50 *Edw. III.* and it was firſt obtained at the conſtitution of *Winchelſey*; and at this day no tithes are payable for mines and quarries, unleſs by cuſtom; ſo that there is no other foundation, in the preſent caſe, but the above decree affirmed by parliament, by which no court, but the Mayor of *London*, can take cognizance of it; and to this purpoſe is the caſe of *Scudamore* againſt *Bell*, 5 *Jac. I.* and this caſe was compared to that of the orphans of *London*, where the court will award a prohibition, if any ſpiritual court interferes with their eſtate, though it be only by private cuſtom. *Walters*, 38 Aſſ. The King's farmer ſues here for tithes; ſo that this court can hold plea of tithes, in any caſe; and there have alſo been caſes, in which the queſtion was, Whether tithes ſhould be paid upon letting on leaſe houſes in *London*, with great fine and rent; and for this particular, this

this court has had juriſdiction; but we will adviſe further.

See this caſe debated again in that of the parſon of Saint *Buttolph*, under the next Term; *Langham* againſt *Baker*, under *Trinity* Term, 10 *Car.* II. Doctor *Bennett* againſt *Treppas*, under *Eaſter* Term, 8 *Geo.* I.

Michaelmas Term, 4 Car. I.
A. D. 1628.

In the *Exchequer*.

The Parſon of Saint *Buttolph's* Caſe.

THE Caſe of the Parſon of Saint *Buttolph's* without *Biſhopſgate*, who ſues here for tithes, and it was moved now again: and *Noy* ſaid, that if one be bound to the King, by covenant, with condition to do ſuch a thing, he may, before a breach, ſue here; and ſo, for the ſame reaſon, may every one, who holds land of the King, by rent-ſervice, either for the repair of a bridge, or of a cauſeway, or of an highway, &c. for in theſe caſes they can the better perform their ſervices, if they are paid by their debtors, &c. and ſo, by this means, all caſes may be drawn into this court, if, upon the other point, the leſſee of the farmer be privileged; but the court diſmiſſed the bill, and declared their reaſon to be ſolely, becauſe the parſon *impropriate* held the reverſion, and the fee farm was entirely granted out of the King; and now the King cannot take advantage of

Privilege of the *Exchequer*, as the King's leſſee diſallowed, becauſe the eſtate under which the party claimed the privilege, was out of the King. *Littl.* Rep. 141.

of this covenant; and they waived all the other queſtions, *viz.* Whether tithes may be ſued for, here; whether the parſon is privileged for houſes in *London*; and whether, feoffee of fee farmer ſhall have privilege here; and only ordered the cauſe to be diſmiſſed.

See this caſe *cited* in the caſe of Dr. *Burgeſs* againſt *Symons*, under *Trinity* and *Michaelmas* Terms, 4 *Car.* I. *Langham* againſt *Baker*, under *Trinity* Term, 10 *Car.* II. Doctor *Bennett* againſt *Trepas*, under *Eaſter* Term, 8 *Geo.* I.

Doctor *Burgeſs* againſt *Symons*.

Tithes payable for an empty houſe. *Litt.* Rep. 141.

THE Caſe of Dr. *Burgeſs*, Parſon of Saint *Magnus*, againſt *Symons*, was now argued again; and *Walters* ſaid, that he willingly gave up the great queſtion of juriſdiction, having inquired what the caſe was, between the parſon and the other; and it appeared, that the pariſhioner farmed an houſe at five pounds, in *Kent*, and as it ſtood empty, he not being able to get a tenant by reaſon of the great plague, would not therefore, during that time, pay tithes.

But *Walters* ſaid, as this was the caſe, he would adviſe him to pay tithes; and further, that he could ſhew the caſe adjudged, where one leaſed an houſe in *London*, rendering rent, and afterwards purchaſed the ſame houſe in fee, though no rent was paid for it, yet, the parſon ſhall have tithes, according to the rent paid laſt; but if one builds a new houſe, and inhabits it, or leaſes it free of rent, the parſon ſhall not have tithes nor remedy; and this is not the great caſe, ſo much litigated, whether tithes ſhall be paid for the encreaſe of rent, when the leſſee makes under

der leaſes, reſerving greater rent; nor the caſe of tithes according to the fine taken for the leaſe, which has been laſt reſolved; and therefore he adviſed the defendant to agree with the parſon, and pay his tithes.

See this caſe, under *Trinity* Term, 4 *Car.* I. Of the parſon of Saint *Buttolph*, under *Michaelmas* Term, 4 *Car.* I. *Langham* againſt *Baker*, under *Trinity* Term, 10 *Car.* II. Doctor *Bennett* againſt *Treppas*, under *Eaſter* Term, 8 *Geo.* I. See the 4th point of the Judges, in the *anonymous* caſe, under *Michaelmas* Term, 9 *Will.* III.

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5 Car. I. A. D. 1629.

In *Chancery*.

Lord *Coventry*.

THE bill was to eſtabliſh certain cuſtoms of tithing within a particular pariſh, the plaintiff alledging, that there were ſuch cuſtoms; and ſetting them forth at large in his bill.

Bill to eſtabliſh certain cuſtoms of tything diſmiſſed, becauſe it had never been tried at law, whether there were ſuch cuſtoms or not. *Neſſ.* Chanc. Rep. 10.

The defendant, by his anſwer, denied the cuſtoms; and alledged, that it was not proper for a court of equity to determine whether there were any ſuch cuſtoms or not; that the bill was in nature of a prohibition at common law; and in a caſe where ſuch a prohibition had never been granted, or the cuſtom tried, and therefore the bill was diſmiſſed.

8 Car. I. A. D. 1632.

In *Chancery.*

Sir *Thomas Coventry*, Lord Keeper.
Sir *Julius Cæsar*, Master of the Rolls.
Richard Shilton, Solicitor General.

Quarles against *Bent.*

Modus decimandi dismissed, because not performed. *Toth.* 283.

A *Modus decimandi* dismissed, otherwise, if performed.

Easter Term, 10 Car. I. A. D. 1634.

In *Chancery.*

Sir *Thomas Coventry*, Lord Keeper.
Sir *Julius Cæsar*, Master of the Rolls.
Edward Littleton, Solicitor General.

New College against *Sampner.*

Modus decimandi for tithes in kind, dismissed, not being performed. *Toth.* 283.

A *Modus decimandi* for tithes in kind, dismissed, otherwise, if performed.

12 Car. I. A. D. 1636.

In *Chancery.*

Thomas Lord *Coventry*, Keeper.
Sir *Dudley Diggs*, Maſter of the Rolls.
Edward Littleton, Solicitor General.

Shires againſt *Burgoine.*

A DECREE for tithe conies, and tithe wood.

Tithes for conies and wood decreed. *Tab.* 284.

Trinity Term, 7 Car. II. A. D. 1655.

In the *Exchequer Chamber.*

Chancery.

Sir *Bulſtrode Whitelocke*, Serjeant at Law; *Richard Webb*, Serjeant at Law; *John Liſle*; Lords Commiſſioners for the cuſtody of the Great Seal of the Commonwealth of *England.*

William Lentball, Maſter of the Rolls.
——— *Ellis*, Solicitor General.

Upper Bench.

John Glynn, Lord Chief Juſtice.
Philip Jermyn.
Richard Nicholas.
Richard Aſh.

Common Bench.

Oliver Saintjohn, Lord Chief Juſtice.
Edward Atkins.
Matthew Hale.
Hugh Windham.

Exchequer.

William Steele, Lord Chief Baron.
Edward Atkins.
John Parker.
Robert Nicholas.

Edmund Prideaux, Attorney General.
Liſburne Long, Recorder of *London.*

The Attorney General *verſus* Staite.

In an information in the *Exchequer*, the value of the tithes muſt be ſet forth. *Hardr.* 4. pl. 3.

IN an information in the *Exchequer* Chamber, by *Engliſh* bill, for ſmall tythes, appertaining to the rectory of *Southwicke*, in *Dorſetſhire*; the defendant, in his anſwer, did not admit the plaintiff's title, but alledged an extinguiſhment of tithes, by unity of poſſeſſion; and the plaintiff made no proof of the value of the tithes, nor what cattle had been depaſtured in the place, where, &c. and for that cauſe the court, upon the hearing, refuſed to direct a trial at law, becauſe no particular damnification appeared to them,

them, whereon to ground a decree for the plaintiff, if the verdict ſhould paſs for him; and thereupon the bill was diſmiſſed.

In the *Exchequer*.

Handwycke againſt *Newte*.

THE plaintiff exhibited his bill, as parſon of *Haddam* in *Hartfordſhire*, for predial and other tithes; and upon proof of the quantity and values, had a decree for the whole; and the clerks ſaid, that this was the conſtant practice, where a bill is exhibited for predial tithes, and the ſingle value only demanded.

Decree for predial tithes. *Hardr.* 4. pl. 4.

In the *Exchequer*.

Guilbert againſt *Everſly*.

THE plaintiff preferred an *Engliſh* bill in the *Exchequer* Chamber, for tithes of herbage, as vicar of *Eling* in *Surry*, againſt an innkeeper who depaſtured travelling horſes; for which there was no cuſtomary payment; and the value of the lands depaſtured were proved to be thirty pounds a year; and the court were in doubt what decree to make for a certain rate to the parſon, it not being aſcertained by cuſtom; and they conceived, that they ought to have regard to the value of the land, which is proved to be thirty pounds a year, and ſo to allow him two ſhillings in the pound; but they agreed clearly, that tithes were payable for ſuch herbage eaten by the mouths of travellers horſes, as aforeſaid; and they held that tithe ſhall be paid for agiſtment of cattle, by the occupier of the lands: but the court ſaid, they would award a commiſſion to inquire into the

Tithes payable for herbage eaten by the mouths of travellers horſes. *Hardr.* 35. pl. 2.

Tithe for agiſtment of cattle by occupier of the land.

value of these tithes, *unless the parties agreed in the mean time*, which they advised.

See the case of *Smith* against *Johnson*, under the year 1713.

Easter Term, 9 Car. II.

A. D. 1657.

In the *Exchequer*.

Sir *Thomas Widdrington*, Lord Chief Baron.
Edward Atkins.
Robert Nicholas.
Roger Hill.

Edmund Prideaux, Attorney General.
Lisburne Long, Recorder of *London*.

Stavely against *Ullithorn*.

The council of *Lateran*, a general law received in *England*; and lands discharged of tithes by that council are discharged by law, as all lands belonging to the *Cistercian* order, were. *Hardr.* 101. pl. 5.

IN an action upon the case in a feigned action, upon a bill in equity, and an order for a trial at law, the question was, Whether such lands were discharged of tithes, as having belonged to *Fountain abbey* in *Yorkshire*, which was of the *Cistertian* order; and it was held, *by the court* clearly, that the council of *Lateran*, which freed that order from payment of tithes, was a general law received in *England*; and if these lands were discharged of tithes, from the time of that council, that no other covenant or contract made by the abbot to pay tithes, could dispense with this privilege, or make them liable to tithes; for once

once diſcharged by this council, always diſcharged; for this council is as forcible as an act of parliament, which concludes all parties.

Once, always diſcharged of tithes.

Act of parliament concludes all parties, as it includes all men's conſent.

And the court was alſo of opinion, that if there were any ſuch agreement for payment of tithes, before the council, that yet this council, as a general law, which includes all men's conſent, had diſſolved it, and the lands were diſcharged.

Agreement for payment of tithes before the council of *Lateran*, diſſolved by that council.

See the caſes of *Wilſon* againſt *Redman*, under *Michaelmas* Term, 12 *Car.* II. *Lord* againſt *Turk*, under *Michaelmas* Term, 8 *Geo.* I.

In the *Exchequer*.

Sheffield againſt *Serjeant*.

UPON a bill in equity, to be relieved for cuſtomary tithes, in *London*, the caſe was, that the plaintiff's title was under a ſequeſtration by parliament, and an order thereupon by the committee for plundered miniſters; and the queſtion was, whether he was relievable according to the decree confirmed by ſtat. 37 *Hen.* VIII. chap. 12. concerning tithes in *London*, by which the Mayor of *London* muſt be firſt addreſſed to; and the decree mentions only the parſon, vicar, and curate; and whether, he that is in by ſequeſtration be within it, not being parſon *de jure*, was the queſtion; and it was urged by the defendant's council, that he is relievable there, and therefore not here, becauſe he comes in under the parſon's title, and as his leſſee; the ſame law is of an impropriator, who is not within the words of the decree; and that ſo it was lately ruled in *Chancery*,

The court was divided in opinion, whether he that is in by ſequeſtration, be relievable for cuſtomary tithes in *London*, according to the decree confirmed by the ſtatute of 37 *Hen.* VIII. chap. 12. *Hardr.* 102. pl. 7.

which the court agreed to, but yet were divided in this caſe; and it was afterwards, by conſent, referred to compromiſe.

Trinity Term, 10 Car. II.
A. D. 1658.

In the *Exchequer*.

Sir *Thomas Widdrington*, Lord Chief Baron.
Edward Atkins.
Robert Nicholas.
Roger Hill.

Edmund Prideaux, Attorney General.
John Green, Recorder of *London*.

Alderman *Langham*
againſt
Baker, and twenty-two others,
Pariſhioners of Saint *Hellen*'s, *London*.

Whether an *Engliſh* bill in the *Exchequer*, for non-paymant of tithes in *London*, according to the decree in ſtat. 37 *Hen.* VIII. chap. 12. lies or not. *Hardr.* 116. pl. 1.

THE plaintiff, as farmer of the impropriate rectory of the ſaid church, prefers his bill here againſt the defendants for not paying their tithes in *London*, according to the decree in ſtat. 37 *Hen.* VIII. chap. 12. to which the defendants plead the ſaid decree, and that the plaintiff hath his remedy before the mayor of *London*, by the act of parliament, which ſettles the decree; and demand judgment, whether or no this court will take cognizance of the matter?

And

And it was held clearly, that the court had juriſdiction in this cauſe; for that it appears by the very decree itſelf, and the act of 37 *Hen.* VIII. and by *Linwood de decimis*, that tithes were payable in *London*, before the ſaid act, for houſes; but the *quota* was doubtful, which is remedied by the ſaid act and decree; and the act has no negative words, it is not ſaid, "before the mayor of *London*, and not elſewhere." See *Scudamore*'s caſe, cited 2 *Inſt.* 659. *Co. Mag. Chart.* upon 2 *Edw.* VI. and tithes were determinable here *ab antiquo*; as appears by 38 Aſſ. *Selden de decimis*, 4 *Edw.* IV. and by *Articuli Cleri*, cap. 4. In the caſe of the king and his farmers, the cauſe follows the perſon, and his privilege; and this caſe is not to be reſembled to caſes where juſtices of peace are empowered by act of parliament; and for that cauſe juſtices of *oyer* and *terminer* have nothing to do, nor juſtices of goal-delivery; and ſo *vice verſa*, 11 Rep. Doctor *Foſter*'s caſe; for they have but a limited juriſdiction; and the King's farmer has, in reſpect of the revenue, the ſame perſonal privilege that the King has; and, without queſtion, the King may ſue here; and it was ruled, that the defendants *anſwer over*.

See another part of this caſe, under *Michaelmas* Term, 10 *Car.* II. See the caſe of Doctor *Burgeſs* againſt *Symons*, under *Trinity* and *Michaelmas*, 4 *Car.* I. and of the parſon of Saint *Buttolph*, under the laſt mentioned Term. Doctor *Bennet* againſt *Treppas*, under *Eaſter* Term, 8 *Geo.* I.

Button

Button againſt *Honey.*

In an *Engliſh* bill for vicarage tithes, plaintiff need not ſet forth, how they became due to him, whether by preſcription, or endowment. *Hardr.* 130. pl. 2.

IN an *Engliſh* bill for vicarage tithes, in ſome towns in *Kent*, the plaintiff did not ſet forth in his bill, how they became due to him, whether by preſcription or endowment, as he ought to have done; and exception was taken to this at the hearing, after anſwer and depoſitions: and the exception over-ruled, becauſe the defendant does by his anſwer admit him to be vicar, and that the tithes in queſtion are his due; but inſiſts only upon payment and ſatisfaction, *which note*: for it has often been ruled contrary, it being the ground and foundation of the plaintiff's bill: but the bill was afterwards diſmiſſed upon the merits, with forty ſhillings coſts.

But ſee the caſes of *Stone* againſt *Ludlowe*, under *Hilary* Term, 14 & 15 *Car.* II. *Pye* againſt *Rea*, under *Eaſter* Term, 7 *Geo.* I.

Same Term.

In the *Exchequer.*

Doble and *Potman.*

In a croſs bill, the plaintiffs need not intitle themſelves to the juriſdiction of the court. *Hardr.* 160. pl. 2.

UPON a croſs bill againſt a parſon to diſcover what ſort of tithes in particular he claims to be due to him; for that the parſon in his bill one while demanded one manner of tithing, and another time, another; the court held, that in ſuch a croſs bill, the plaintiffs need not intitle themſelves to the juriſdiction of the court, becauſe the croſs bill is grounded upon another bill here in court; as if a man

man be ſued here in the office of pleas, he may have an *Engliſh* bill to be relieved againſt the plaintiff, without ſetting forth matter of juriſdiction.

Michaelmas Term, 10 Car. II.
A. D. 1658.

In the *Exchequer*.

Alderman *Langham*
againſt
Baker, and twenty-two others,
Pariſhioners of Saint *Hellen*'s, *London*.

If a *modus decimandi* be alledged no otherwiſe than by way of anſwer to an *Engliſh* bill for tithes, the defendant muſt anſwer to all other parts of the bill, but if he pleads it, he need not anſwer to any other matter. *Hardr.* 130. pl. 4.

TO an *Engliſh* bill for tithes of certain houſes in *London*, according to the act of 37 *Hen.* VIII. chap. 12. and to have a diſcovery of the improvements of rent; the defendants, in their anſwers, ſet forth a cuſtomary payment in lieu of all tithes; and exception was taken to their anſwers, becauſe they do not diſcover their rents, but rely upon their anſwer *de modo decimandi*; and the court held, that the *modus* being alledged no otherwiſe, than by way of anſwer, they ought likewiſe to have ſet forth the particulars of their rents, and anſwer to all parts of the bill; but if the defendants had pleaded it, they need not have anſwered to any other matter; and ſo it was ruled, though objected, that if the proofs were againſt them upon the *modus*, they might then anſwer upon interrogatories, to the particulars.

See *Trinity* Term, 10 *Car.* II. A. D. 1658, another part of this ſame caſe. But ſee the caſe of *Gumley*

Gumley againſt *Fontleroy*, under *Eaſter* Term, 6 *Geo.* I. wherein the latter part of this caſe is denied to be law.

See the caſe of *Ayde* againſt *Flower*, under *Trinity* Term, 2 *Geo.* I. and under the year 1717.

Michaelmas Term, 12 Car. II.

A. D. 1660.

In the *Exchequer*.

Sir *Matthew Hale*, Lord Chief Baron.
Sir *Edward Atkins*.
Sir *Chriſtopher Turner*.

Sir *Geoffry Palmer*, Baronet, Attorney General.
John Howell, Recorder of *London*.

Wilſon, againſt *Redman*, *Burton*, and others.

In whoſe hands, lands, as having been part of any abbey of the *Ciſtercian* order, ſhall be diſcharged of tithes, by virtue of the ſtatute for the diſſolution of monaſteries. *Hard.* 174. pl 5. 190. pl. 17.

UPON a bill in equity for tithes, and a trial at law directed, to try, whether or no, certain lands, of which tithes were demanded, having been part of the poſſeſſions of the abbey of the *Ciſtercian* order, had belonged to any order of religion, that claimed to be diſcharged of tithes, *quamdiu propriis manibus*, &c. It was held clearly by the court, that if, at the time of the diſſolution of monaſteries, by ſtatute 31 *Hen.* VIII. chap. 13. ſuch lands were in leaſe, or an eſtate for life or in tail were out upon them,

yet the revertioner ſhould have the benefit of the diſcharge after the determination of thoſe eſtates; for that the diſcharge was not interrupted, but ſuſpended only, during the time they were in the hands of particular tenants. See *Dy.* 277. *b. accord.* But if an *eſcheat* had happened, it was doubted then, whether they ſhould have been diſcharged, having been parted withal by a feoffment before the ſtatute of "*Quia emptores terrarum*" by an abbey, to hold of them by certain ſervices; otherwiſe, it is in caſe of a diſcharge by *unity*; for that muſt be perpetual, and continue ſo at the time of the diſſolution.

Eſcheat.

Quia emptores.

Unity.

See the caſes of *Stavely* againſt *Ullithorn*, under *Eaſter* Term, 8 *Car.* II. *Lord* againſt *Turk*, under *Michaelmas* Term, 8 *Geo.* I.

Eaſter

Eaſter Term, 13 Car. II.
A. D. 1661.

In the *Exchequer.*

Edward Cage, —— Plaintiff;
William Warner and *John Lucy*, Defendants.

Defendants muſt anſwer an incumbent's bill for *diſcovery* of tithes illegally ſeized, with all the particulars and values. *Hardr.* 182. pl. 6.

THE bill charged, that the plaintiff in the month of *May*, 1658, became incumbent of the church of *Beareſted* in *Kent*; and that the defendants in *June* 1658 and 1659, by colour of an order of ſequeſtration, made by the committee, in the county of *Southampton*, as they pretended, had ſeized divers tithes of divers pariſhioners, within the plaintiff's pariſh, due to the plaintiff; and to diſcover the particulars of the tithes ſo taken, and their values, and to have them paid to the plaintiff, was the ſcope of the bill; to which the defendant demurred, becauſe it is a matter determinable at law, and a criminal matter; but the court put the defendants to their anſwer, *becauſe it is matter of diſcovery.*

Holbeech againſt *Whadcocke.*

Chief Baron *Hale* ſaid, that tithes for barren cattle were due of common right, according to the value of the land, after the rate of two ſhillings a pound. *Hardr.* 184. pl. 9.

IN a ſuit by *Engliſh* bill for the tithes of the herbage of barren cattle, and others; the Chief Baron ſaid, that tithes for barren cattle were due of common right, according to the value of the land, after the rate of two ſhillings a pound; for that they cannot be otherwiſe valued or accounted for, becauſe the profits of the land, for which they are paid, are perceived by the mouths of beaſts; but by cuſtom or preſcription, ſuch tithes may be paid in other manner; as by the acre, and all manner of cattle, barren,

ren, and for the *plough*, and the *pale*; but of common right, tithes are not due for cattle bred for the *plough* and the *pale*, to be uſed in the ſame pariſh; but if they belong to another pariſh, tithes are due for them; and of that opinion was the whole court; and when tithes are payable by *cuſtom*, they ſhall be paid, though the lands are not rented, or lay freſh. Plough. Pale.

See the caſe of *Smith* againſt *Johnſon*, under the year 1713.

Pory againſt *Wright*, and others.

UPON a bill in equity for tithes of paſture ground, parcel of the poſſeſſions of the abbey of *Fountain*, being of the *Ciſtercian* order; it was held by the court, that tithes for the agiſtment of cattle are payable by the owner of the cattle, for the cattle take the profits and herbage of the ſoil; ſo in the caſe of commons; and it cannot be ſaid, that the profits are taken by the owner of the ſoil, or that the ground is in *propriis manibus*. The chief baron ſaid, the owner of the ſoil might pay the tithes, but clearly the agiſter is compellable to pay them.

Tithes for the agiſtment of cattle in paſture ground, parcel of the poſſeſſions of abbey of the Ciſtertian order, are payable by the owner of the cattle. *Hardr.* 184. pl. 10. Agiſtor compellable to pay the tithes, by Lord Chief Baron *Hale*.

See the caſe of *Underwood* againſt *Gibbon*, under *Hilary* Term, 1 *Geo.* I.

Randal againſt *Head*, and others.

IN a bill for tithes of *conies*, by cuſtom (among others) to pay the tenth cony, or the value of it; the defendants, by their anſwer, deny the cuſtom; but do not diſcover how many conies they killed, or the value of them, as the bill required; to which, exceptions being taken, the court held, that a diſcovery needed not, where there is a full anſwer given to the thing in demand; and till that be tried, the defendants

To a bill for tithes of conies, defendant is not obliged to diſcover how many conies he killed, or the value of them. *Hardr.* 188. pl. 14.

fendants are not obliged to diſcover; but the court thought it fit, that the defendant, if ſuch matter were found againſt him, ſhould be examined upon interrogatories, to diſcover his knowledge; and ſo it was ordered, and an iſſue directed to try the cuſtom: alſo, the demand of the tithes of conies being againſt common right, the court conceived the caſe, for that reaſon, to be ſtronger for the defendant.

Tithes for conies are againſt common right.

Driver againſt *Mann.*

Quære, whether tithes were ſuable for, in the *Exchequer*, before ſtat. 2 & 3 *Edw.* VI. *Hardr.* 190. pl. 18.

UPON a bill in equity for tithes of corn and grain, and a demurrer to it, becauſe the ſingle value was not barely demanded; but it was a bill of diſcovery only, to enable the plaintiff to recover the * *treble* value; *ſed non allocatur*, for that tithes were ſuable for in this court before the ſtatute of 2 & 3 Edw. VI. chap. 13. *which note, and quære*; becauſe it is contrary to common practice and uſage to have ſuch a bill, without alledging, that the plaintiff is contented to receive the ſingle value only.

* The ſtatute ſays, *double only.*

Michaelmas

Michaelmas Term, 13 Car. II.
A. D. 1661.

In the *Exchequer.*

Sir *William Waller* and his Wife againſt *Farmor.*

IN an *Engliſh* bill for tithes, a *modus decimandi* was in iſſue, and a trial awarded by the court, *to inform their conſcience*, in the county of *Oxford*; and after a verdict againſt the plaintiff, and againſt the directions of the court to the jury, as appears by affidavit, it was now moved to have a trial at bar, becauſe the plaintiff was a counſellor at law; but not allowed, becauſe here the matter of the iſſue is *local* not *tranſitory*; then a trial was prayed to be awarded into an adjoining county, by reaſon of the great power, and influence, that the defendant had in *Oxfordſhire*; and upon this, the matter was adjourned; but afterwards a new trial was granted in *Oxfordſhire*, and another verdict againſt the plaintiff upon that trial too.

Two verdicts againſt the plaintiff on an iſſue directed by the equity court of *Exchequer*, to try *a modus decimandi*, for the information of the ſaid court.

Hardr. 202. pl. 7.

Breamer againſt *Thornton* and others.

IN a bill for tithes, for the year, one thouſand ſix hundred and ſixty, the defendants, by their anſwer ſet forth an agreement made ten years ago between the plaintiff and the defendants, and other the pariſhioners of the ſaid pariſh, to take two ſhillings and ſixpence in the pound, for every pound rent of land, within the pariſh, as long as they ſhould live together, and he continues parſon; and that they had conſtantly paid it accordingly; and that by the ſaid agreement, the payment was to be made upon the

A *parol* agreement to accept of a *modus* in lieu of tithes, how far available to the pariſhioners, and how far binding to them.

Hardr. 203. pl. 2.

 firſt

firſt day of *May*, and the firſt day of *November*, yearly; and it appeared, that the plaintiff had not given notice, that he retracted the ſaid agreement, or diſſented from it, after the firſt day of *May*, one thouſand, ſix hundred, and ſixty ſix.

And *by the court:* This agreement will not bind the parſon, being by parol, but it will excuſe the pariſhioners of the penalties and damages, given by the ſtatute of 2 & 3 *Edw.* VI. chap. 13. and from coſts till notice given of his diſſent from the agreement; and that notice given after payment becomes due, is too late; and that it is too late if given after the lands are manured and ſowed, becauſe, perhaps, if notice had been given before, he would not have been at ſo great a charge upon them, or not have ſown them at all; and the court deſired the parties to agree; and adjourned.

See *Anon.* under the year 1717, and the caſe of *Reynal* againſt *Rogers*, under *Trinity* Term, 3 *Geo.* I.

Hilary Term, 14 & 15 Car. II.

A. D. 1662.

In the *Exchequer.*

Page's Caſe.

Defendant ſet forth in his anſwer, that the lands where tithes were demanded, were parcel of a priory, which was diſcharged by order, without more, and held good. *Hard.* 322. pl. 5.

IN a bill for tithes, the defendant, by his anſwer ſet forth, that the lands whereof tithes were demanded, were parcel of the priory of and

that

that the lands belonging to that priory, were discharged by order, without saying more, and this was held sufficient: *which note*, because of the uncertainty.

See the cases of *Ayde* against *Flower*, under *Trinity* Term, 2 *Geo.* I. *Hanking* against *Gay*, under *Hilary* Term, 4 *Geo.* I.

Stone against *Ludlowe* and others.

IN a bill for tithes due to the complainant, as vicar and incumbent of in *Essex*, the complainant did not shew how he was intitled to them, *viz.* by prescription, endowment, or otherwise; and the court held it to be good notwithstanding; *which note*, for it is against many precedents in this court, which Sir *Thomas Hardres*, the King's Serjeant at law, and the reporter of these cases, had known of demurrers for that cause held to be good.

Though complainant did not shew, how he was intitled to the tithes, yet held good; but *quære*. *Hardr.* 322, pl. 4.

See the case of *Button* against *Honey*, under *Michaelmas* Term, 10 *Car.* II. *Pye* against *Rea*, under *Easter* Term, 7 *Geo.* I.

Trinity Term, 15 Car. II.
A. D. 1663.

In the *Exchequer*.

Henry Twiſs, clerk, — Plaintiff.

Brazen Noſe college, in *Oxford*, *Blunt*, *Archer*, and *Carpenter*, } Defendants.

Vicar who hath, time out of mind, or for a long time, uſed to take tithes or other profits, ſhall not be concluded by the tithes not being expreſſed in the endowment of the vicarage. *Hardr.* 328. pl. 2.

IN a bill at the ſuit of the vicar of *Gillingham*, in *Kent*, for tithes of the manor of *Uxbury*, and other lands belonging to the rectory impropriate of *Gillingham* aforeſaid; the tithes demanded being for eight years laſt paſt, and ending in the year of our Lord, one thouſand ſix hundred ſixty and one.

The caſe upon hearing appeared to be, that for divers years before the bill exhibited, in the times of many vicars, the ſaid tithes had been enjoyed by the ſaid vicars of *Gillingham* aforeſaid; but an endowment was produced bearing date the ſeventh day of *March*, in the year, one thouſand, three hundred, ſixty two, mentioned to have been made by *Iſlip*, then Archbiſhop of *Canterbury*, and preſerved in the archbiſhop's regiſter; by which it did not appear, that the vicar was endowed with any tithes of corn or grain; nor in the ſaid inſtrument was liberty reſerved to the archbiſhop, as is uſual in ſuch caſes, to augment or diminiſh, &c. and it was thereupon inſiſted, that the vicar ought not to have thoſe tithes.

But the court held, "that where a vicar has uſed time out of mind, or for a long time, to take tithes or other profits, he ſhall not be concluded, by their not being expreſſed in the endowment of the vicarage," and that it has been often ſo held and ruled; and

and it ſhall be preſumed, by reaſon of a long poſſeſſion of ſuch tithes, &c. that the vicarage has, at ſome time or other been augmented therewith; and the not reſerving ſuch a power to the archbiſhop is not material; for an augmentation may have been notwithſtanding, with the aſſent of, or upon citing all parties; but not without notice or citation; as it may be, when ſuch a power, as aforeſaid, is reſerved to the archbiſhop.

See the caſe of *Hunt* againſt *Codrington*, under *Trinity* Term, 11 *Wil.* III. *Fox* againſt *Rutty*, under *Michaelmas* Term, 7 *Geo.* I.

Daſhfield againſt *Curnocke.*

Arrears of tithes payable, that accrued during the vacancy of the vicarage. *Hardr.* 329. pl. 3.

IN an *Engliſh* bill for tithes of a park, due to the plaintiff, as vicar of *Barkly* in *Glouceſterſhire*, for ten years laſt paſt; the caſe, upon hearing, appeared to be, that one Doctor *Chetwin* was vicar there, and one *Nicholas Paul* his curate; and that after the death of Doctor *Chetwin*, who died about ten years ago, the ſaid *Paul* held in as vicar, and officiated as ſuch, till *Auguſt*, of the year of our Lord, one thouſand, ſix hundred, and ſixty one, and that for refuſing to ſubſcribe according to ſtat. 12 *Car.* II. chap. 17. and to conform to the diſcipline of the church of *England*, he was removed, and the plaintiff preſented to the vicarage.

12 Car. II. chap. 17.

And the court held clearly, that the plaintiff was intitled to all the vicarage tithes, that became due ſince the death of Doctor *Chetwin*, during the vacation; for that *Paul* was not confirmed in the vicarage, by the ſaid act for confirming miniſters; becauſe he was not incumbent by any of the ways or means mentioned in that act, [ſee the act of 12 *Car.* II.

chap. 17. ſect. 1.] as he ought to be, if he would intitle himſelf to the benefit of the ſaid act,

But becauſe it was hard upon the tenant to pay ſo much at once, though he had paid no tithes in the mean time, *viz.* for ten years laſt before the bill exhibited, and alſo, becauſe the now plaintiff is removed from the ſaid vicarage, having accepted of another benefice, and was vicar there but twelve months; for theſe cauſes, though the tithes in queſtion were worth ten pounds a year upon an average, one year with another; yet through the mediation of the court the plaintiff accepted of the ſum of ſixty-five pounds in ſatisfaction for the whole, coſts of ſuit included, and the money to be paid the next term; and ſo it was decreed, &c.

Michaelmas

Michaelmas Term, 16 Car. II.
A. D. 1664.

In the *Exchequer.*

Sir *Matthew Hale*, Lord Chief Baron.
Sir *Edward Atkins.*
Sir *Chriſtopher Turner.*
Clemens Spelman.
Sir *Richard Rainsford.*

Sir *Geoffry Palmer*, Baronet, Attorney General.
John Howell, Recorder of *London.*

Grant againſt *Hedding* and *Ball.*

Of tithes due and payable for a nurſery, trees, fruit, and for corn. *Hardr.* 380. pl. 9 See Eq. Caſ. abr. 366. pl. 4.

IN a bill in equity for the tithes of a nurſery ſold; upon hearing of the cauſe divers doubts and queſtions were made: as

Firſt; Whether tithes ſhould be paid, if the trees yielded no other fruit?

Secondly; Whether tithes ſhould be paid for thoſe trees, that yield fruit, which pay tithes?

Thirdly; If ſome yield fruit and others not, whether or no, thoſe that yield fruit, privilege and exempt the others that yield none, when they are all ſold together?

Fourthly; Whether tithes ſhall be paid for them, when they are ſold and tranſplanted within the ſame pariſh?

Fifthly; Whether the vendor or vendee ſhall pay the tithe?

In this caſe were cited *Cro. Eliz.* *Cro. Jac.* *Co. Magn. Carta.* and *Doctor and Student.*

And the court was of opinion, that if the owner ſells them and pulls them up himſelf, he ſhall pay the tithes; but if he ſells them particularly to another, the vendee ſhall pay the tithes; as in caſe of tithes of corn, if corn be ſtanding, the vendee ſhall pay the tithes; but if he ſell it after ſeverance, the vendor muſt. *And adjourned.*

But afterwards, tithes were decreed in all ſuch caſes.

Michaelmas Term, 22 Car. II.
October 31, A. D. 1670.

In *Chancery.*

Sir *Orlando Bridgman*, Baronet, Lord Keeper.
Sir *Harbottle Grimſtone*, Baronet, Maſter of the Rolls.
Edward Turner, Solicitor General.

Buſh againſt *Riſbley.*

A rate tithe is not to be decreed in *Chancery.* 1 Chanc. Caſ. 287.

THE bill was to have a rate-tithe ſettled by decree againſt the impropriator, in order to prevent multiplicity of ſuits.

And

And for the plaintiffs, it was prayed, that the court would either decree, that the plaintiffs ſhould have their lands under that *modus decimandi*; which at a trial at law, pending this ſuit, was found by verdict, or that the court would direct another trial to try the verity of the *modus*, and reſerve the cauſe till after the ſecond trial (if the court were not ſatisfied with one verdict) it being inſiſted, that after ſuch tithe-rate had been aſcertained by two verdicts, the court ought to decree an enjoyment of the lands, for which the *modus* was payable under that rate-tithe, and diſcharge the tithe in kind; and it was compared to the caſe of copyholders, that have their fines and ſervices aſcertained by the aid of this court, by directing of trials for that purpoſe firſt, and afterwards decreeing according to the verdicts on ſuch trials.

Copyholders.

But for the defendant, it was inſiſted, that this court had not at any time decreed a *modus decimandi*, and that tithes were payable in kind by common right; and though it was inſiſted on, for the plaintiffs, that it was frequent in the *Exchequer*, to decree a rate-tithe, the Lord Keeper did not think fit to decree in ſuch a caſe, but ordered two depoſitions to be made uſe of at law, as occaſion ſerved; and diſmiſſed the bill.

Tithes payable in kind by common right.

Depoſitions ordered to be uſed at law.

Hilary

Hilary Term, 24 Car. II.
A. D. 1672.

In *Chancery*.

Sir *Heneage Finch*, Lord Keeper.
Sir *Harbottle Grimſtone*, Baronet, Maſter of the Rolls.
Francis North, Solicitor General.

Anon.

Tithes may be ſued for in *Chancery*.

A BILL was exhibited for tithes, and the juriſdiction of the court demurred to; but the demurrer was over-ruled, and the defendant ordered to anſwer; but it was ſaid by *Finch*, Lord Keeper, that the court of *Exchequer* did not hold plea by *Engliſh* bill, until ſtat. 33 *Hen.* VIII. chap. 39.

Exchequer did not hold plea by *Engliſh* bill, until 33 *Hen.* VIII. 1 *Freem.* 303. pl. 371.

Michaelmas

Michaelmas Term, 25 Car. II.
A. D. 1673.

In *Chancery.*

Sir *Heneage Finch*, Lord Keeper.

Sir *Harbottle Grimſtone*, Baronet, Maſter of the Rolls.

Sir *William Jones*, Solicitor General.

Thomas Edgerley, Gentleman, Plaintiff.

John Price, Clerk; *Samuel Hickman*, *Mary Avis*, widow; *John Hickman*, *George Avis*, and *Elizabeth*, his wife, and *Elizabeth Ware*, an infant, by *John Feary*, her guardian; and *Anne*, Lady *Baltinglaſs*, and *William*, Biſhop of *Lincoln*, ——— } Defendants.

An agreement for incloſing lands which were exchanged, was confirmed by a decree againſt ſeveral, whereof the parſon of the pariſh was one, and he and his ſucceſſors bound as to the tithes. *Nelſ.* Chanc. Rep. temp. *Finch* 18, 19.

THE bill was to have an agreement performed for incloſing certain lands and common fields in *Waterſtrafford*, in the county of *Bucks*, made between the plaintiff, lord of the manor of *Waterſtrafford*, and the defendant *Price*, rector of the pariſh, and other the defendants who were ſeized of certain parcels of lands there, which, by agreement, were to be exchanged and incloſed; and were, in purſuance thereof, accordingly ſurveyed, ſet out, and incloſed, to the great improvement thereof, and benefit of the defendants, and of the church, at the plaintiff's charge, and the agreement fully performed on his part, as is more particularly ſet forth in the bill.

The

The defendants *Price*, the parſon, and *Hickman*, confeſs the agreement; and all other the defendants (excepting thoſe two) confeſs their conſent to the allotments, and that it would be very advantageous to all parties; and thereupon the cauſe coming on to be heard before the Lord Keeper *Finch*, he found, upon what was ſaid and read, that the agreement was good, and the incloſure was for the benefit of all parties intereſted; but that *Price* the parſon, and the Lady *Baltinglaſs*, were the chief perſons who oppoſed the eſtabliſhing the incloſure. He ordered them to attend, together with the plaintiff *Edgerley*, who was lord of the manor, and this was in order to an accommodation; who accordingly attending, and he ſatisfying them, that the agreement was beneficial to all parties, *and particularly to the church*, becauſe the plaintiff agreed to pay to *Price* and his ſucceſſors ſixty pounds a year, (beſides the lands allotted to him in exchange) and to ſecure the ſame by quarterly payments in lieu of the tithes, for the raiſing whereof the ſeveral landholders in the ſaid pariſh, and their heirs and aſſigns, were to pay to the plaintiff, his heirs and aſſigns, their reſpective tithes from thenceforth growing due from their reſpective lands.

And it appearing that *Hickman* alone diſſented, and that the infant, who anſwered by her guardian, and the other defendant *Aris*, who claimed an eſtate for life, ought to be bound by an agreement, which was ſo much for the public good, and benefit of all parties:

The decree was, that the ſaid agreement, and the incloſures made purſuant to it, ſtand ratified and confirmed, and that all parties, their heirs, aſſigns, and ſucceſſors, enjoy their reſpective allotments in

ſeveralty againſt each other, their heirs, aſſigns, and ſucceſſors, that at *Chriſtmas* next the plaintiff ſhould pay to *Price* the parſon, one hundred and thirty pounds, being the arrears of the ſixty pounds a year from the time of the agreement, and to ſecure the payment thereof, for the time to come, to him and his ſucceſſors, out of a ſufficient part of land in that pariſh, in ſuch manner as a maſter ſhall approve, who is to direct conveyances between all the ſaid parties, if they cannot agree among themſelves; and that the landholders in that pariſh, their heirs and aſſigns, (other than the plaintiff and his heirs and aſſigns) do pay the tithes of their reſpective lands to the plaintiff, his heirs and aſſigns, and thereupon to be acquitted againſt *Price* and his ſucceſſors for ever, which payment is to go towards the ſatisfaction of the ſixty pounds a year.

And a perpetual injunction was awarded for quieting the poſſeſſion of the plaintiffs and defendants, their heirs and aſſigns, and *Price* and his ſucceſſors, and all claiming from or under them, in the quiet poſſeſſion of the ſaid allotments and incloſures, againſt each other, their reſpective heirs and aſſigns, and ſucceſſors of the ſaid *Price*, &c.

Matthew Black, Eſq; *John Goodman*, ſenior; *Thomas Rogers*, and *Thomas Font*, } Plaintiffs.

Philip Elliot, Clerk, —— Defendant.

THE plaintiff's bill is for payment of a *modus* of fifteen ſhillings and four-pence a year, in lieu of tithes, &c.

The defendant pleaded to a bill for a *modus* for tithes, that he had obtained a verdict and judgment in an action of debt, upon ſtat. 2 & 3 *Edw.* VI. chap. 13. againſt the defendant, for not ſetting out the tithes in kind; and the plea was allowed to be good. *Nelſ.* Rep. in *Chanc. temp. Finch* 13.

The

The defendant, as to ſo much of the bill as chargeth the payment of a *modus*, or any yearly ſum of money, for, and in lieu of tithes, for any of the lands in the bill mentioned, (except out of *H.* meadow) or that ſeeketh relief here, againſt the defendant, for or concerning the ſame, or againſt the verdict obtained by the defendant againſt the pretended *modus*, or which ſeeketh relief touching any record, *exemplification* or *abſtracts* concerning the premiſſes; for plea ſaith, that the defendant now is, and for twenty years laſt paſt hath been, rector of the pariſh and church of *Hunſden*, and duly inſtituted and inducted, &c. and that in *Michaelmas* Term, 12 *Car.* II. an action of debt was brought by him as rector, &c. againſt *Thomas Rogers*, concerning the payment of tithes in kind upon the ſtatute of 2 & 3 *Edw.* VI. chap. 13. for the forfeiture given by that ſtatute for not ſetting out his tithes, which ſaid *Rogers* was then tenant of parcel of the lands, whereof the bill ſuggeſts the *modus* to be paid; and the cauſe coming on to a trial, the then lord *Willoughby*, who was then owner of the ſaid lands, endeavoured to ſupport the pretended *modus* now inſiſted on by the plaintiff, and made all the defence he could in perſon, both on the behalf of himſelf and tenants, and eſpecially of his tenant *Rogers*, againſt whom the ſaid action was brought; but yet a verdict paſſed at the aſſizes againſt the pretended *modus*, on which verdict judgment is duly entered, which verdict and judgment the defendant pleads in bar of the plaintiff's demand by this bill; and the court allowed the plea to be good.

See the caſe of *Benſon* verſus *Olive*, under *Trinity* Term, 3 *Geo.* II.

Hilary

Hilary Term, 27 & 28 Car. II.
February, A. D. 1675.

In *Chancery*.

Heneage Lord *Daventry*, Lord Chancellor.
Sir *Harbottle Grimſtone*, Baronet, Maſter of the Rolls.
Sir *William Jones*, Solicitor General.

Brown againſt *Vermuden*.

On a pariſh being ſued, four named to defend, and a decree againſt them, one who claims under none of the four, conteſts the decree; and though no party or privy, may have a bill of review. 1 Chanc. Caſ. 272.

WHERE a pariſh is ſued, and four named to defend, and a decree againſt them, one, who claims under none of the four, conteſts the decree.

Brown, vicar of *Worſelworth*, ſued a *ſcire facias* and by *ſubpœna* to have execution of a decree, had by and on the behalf of one *Carrier*, his predeceſſor, for the tenth dick of lead ore in the pariſh, at the charge and labour of the miners there, (*viz.*) the vicar to pay one penny a dick.

Carrier, his predeceſſor, ſued divers miners there, grounding his ſuit by preſcription; four perſons were named by the miners to defend the ſuit for them, and a decree paſſed againſt the four, for *Carrier* and his ſucceſſors, that the defendants and all the miners ſhould pay; *Vermuden*, who owned and wrought a mine there, being ſerved, appeared, and inſiſted that he is not bound by the decree, for that he was not party or privy, nor claimed under any who was; and if he ſhould be bound, then the parſon ought to be bound, if the decree had been againſt the parſon, which could not be; becauſe the parſon nor ordinary were

were parties, and the defendant could have no bill of review of it, if it be erroneous, and therefore ought not to be bound.

The Lord Chancellor. 1. If the defendant ſhould not be bound, ſuits of this nature, as in caſe of incloſures, ſuits againſt inhabitants for ſuit to a mill, and the like, would be infinite, and impoſſible to be ended; and declared, that the defendant, though no party nor privy, yet may have a bill of review, becauſe he is grieved by the decree.

Dutchy court's juriſdiction.

Secondly; The defendant inſiſted on the juriſdiction of the Dutchy court, the pariſh being part of the *Dutchy*; and the King had *Cap.* and *Lat.* as in right of a *Dutchy*, and a court of revenue.

The Chancellor. It is within the *county palatine*: this court may hold plea of lands in the *Dutchy*.

Thirdly; The court who made the decree, held the penny *per* dick too little, and ordered a commiſſion to ſettle ſome more reaſonable recompenſe to the miners, which never was executed. *Not allowed.*

Trinity

Trinity Term, 28 Car. II.
A. D. 1676.

In *Chancery.*

Heneage Earl of *Nottingham*, Lord Chancellor.
Sir *Harbottle Grimſtone*, Baronet, Maſter of the Rolls.
Sir *William Jones*, Solicitor General.

Brown againſt *Vermuden.*

Tithe of lead ore, 1 Chanc. Caſ. 282.

BROWN, parſon of *Warſelwerth*, exhibited a bill againſt *Vermuden*, to have performance of a decree, obtained againſt certain perſons, workers and owners of lead mines, in *Derbyſhire*; whereby a certain manner of tithing of lead ore was decreed, not only againſt the particular perſons named defendants, but all other owners and workers.

Vermuden pleaded *(among other matters)* that he was a ſtranger, and claimed not under any party or privy to the bill, and therefore inſiſted he ought not to be proſecuted by a bill, not grounded on the fact and title, but on the decree, in the nature of a *ſcire facias.*

This plea was formerly over-ruled by the Lord Chancellor; [ſee this caſe under *Hilary* Term, 27 & 28 *Car.* II.] but a commiſſion to examine the quantity and quality of the ore, and the plaintiff's title, if parſon, &c. The ſix clerks appointed time and place, but the defendant's witneſſes were ſo aged,

that they could not come to the place, and therefore a new commiſſion prayed.

Lord Chancellor. The time and place is only for the firſt meeting of the commiſſioners; but afterwards, they may adjourn to another time, or another place.

See the caſe of *Burton* againſt *Hutchinſon*, under *Eaſter* Term, 4 *Jac.* II.

Trinity Term, 29 Car. II.
A. D. 1677.

In *Chancery*.

Robert Roak, *Henry Collier*, and ſeveral others, inhabitants of *Horſell* in *Surry*, on the behalf of themſelves, and other inhabitants there, } Plaintiffs.

Godfrey Lee, — Defendant.

Tithes being claimed by the defendant as his abſolute inheritance, under a grant from the king, after the diſſolution of monaſteries, the ſame were decreed, &c. *Neſſ.* Chanc. Rep. *temp. Finch.* 309.

ON the *third* day of *June*, in the *eighth* year of the reign of King *Henry* VIII. the prior of *Newark* granted to one *Watſon* a clergyman, for his life, the church and chapel of *Horſell*, and one meſſuage, together with all the ſmall tithes ariſing there, under the yearly rent of two ſhillings: by which grant it was provided, that *Watſon*, either by himſelf or deputy, ſhould officiate in the ſaid church or chapel, and ſerve the cure thereof; and ſhould from time to time find bread and other things uſed at the *altar*, for the benefit of the pariſhioners there.

After

After the diſſolution of abbies and priories, &c. King *Henry* VIII. granted the ſaid tithes in fee farm to *A. B.* under the obligation of providing a ſufficient miniſter to officiate in the ſaid church, which hath ever ſince been done, and the miniſter had taken the ſaid tithes.

But within ten years laſt paſt, one *Anne Aleborn*, pretending an eſtate in the ſaid rectory, provided one *Webb* to officiate there, which he did, and enjoyed the ſaid meſſuage and tithes; but the ſame being not worth more than twenty pounds a year, *Webb* diſcontinued, and no care was taken for any miniſter to officiate there.

Thereupon the pariſhioners applied themſelves to the biſhop of the dioceſe, who by a writing, appointed the plaintiffs *Roak* and *Collier*, and others, to collect the tithes, and to diſpoſe them to ſuch perſon who ſhould be approved of by the biſhop to officiate there.

And now *Webb*, who had declined the cure, pretended a title to the tithes, by virtue of ſome leaſe made to him thereof; and proſecutes *Roak* and the other pariſhioners for the ſame, and which have been due for ſeveral years; whereas part of the tithes were paid to himſelf, and the other part to the miniſter who ſerved the cure, according to a ſequeſtration or writing of the biſhop.

And of late the defendant *Lee* pretends ſome title under *Aleborne*, and endeavours to evict the preſent miniſter, who officiates by the approbation of the biſhop, and declares, that the tithes are his inheritance, and, when recovered, he will diſpoſe of them to his own uſe; by which means, the church will be

left without a miniſter, contrary to the former grant and uſage.

The defendant *Lee* claims an abſolute eſtate in the premiſes; and that if the miniſter did receive the ſame, it was not in right of the church, but as the free gift of the court; for that in the fourth year of king *Charles* I. the premiſes being veſted in the crown; the king did, by letters patent, dated at *Cornbury* in *Middleſex*, 30th *July*, A. D. 1629, grant the ſaid tithes to *W.* and *H.* and to their heirs, together with the ſaid manſion houſe, to hold as of his manor of *Eaſt-Greenwich*, in free and common *ſoccage*, rendering two ſhillings a year; under which grant the defendant claims, by ſeveral meſne conveyances; and that he hath paid the ſaid yearly rent of two ſhillings; and that the ſaid tithes are not ſubject to any other payment for a miniſter, &c.

And that the biſhop of the dioceſe hath not power to allow a compenſation out of the ſaid tithes to any perſon whomſoever officiating there, the ſame being the eſtate and inheritance of the ſaid defendant.

The court declared, that this bill, which was now brought, to have the tithes, and that the ſame might be applied to the maintenance of a miniſter officiating there, ſhall remain as a continual claim againſt the defendant; and he now conſenting in court, not to pull down or deface the ſaid chapel; the ſame was decreed accordingly; and that he ſhould not diſturb any of the pariſhioners in burial, in going or returning to and from the church and church-yard, in order to attend divine ſervice, and for performing other rights and duties in and to the ſaid church, or hinder any perſon appointed by the biſhop, to officiate there; and that the church-wardens for the time being

ing ſhall take care to keep the ſaid church in repair; and a perpetual injunction was awarded to ſtay all ſuits, &c.

Michaelmas Term, 29 Car. II.

November 21. A. D. 1677.

In *Chancery*,

Anon.

A BILL being preferred againſt a Quaker for tithes, who refuſed to anſwer upon oath; the defendant was brought, by ſeveral orders, to the bar; and being indeed a Quaker, prayed to anſwer without oath; and having been brought up three times before; the Lord Chancellor did admoniſh him of the peril, that the bill would be taken for true, entirely as it is laid, if he anſwered not; but defendant ſaying as before, the Chancellor pronounced his decree for the plaintiff, and that the bill be taken *pro confeſſo*; and he referred the valuation to a maſter, and to examine what was due; and to be armed with a commiſſion for that purpoſe.

Bill for ſmall tithes againſt a Quaker, taken *pro confeſſo*, defendant refuſing to anſwer: and a decree for plaintiff, with reference to a maſter of the valuation; and a commiſſion to examine witneſſes. 2 *Freem.* 27. pl. 29. 2 Chanc. Caſ. 237.

And the Lord Chancellor declared, that this court had a cognizance of matters of tithes, as well as the *Exchequer*; and that the plaintiff had *his choice of the court*; though Sir *John Churchill*, not being of council, but *amicus curiæ*, ſaid, that this cauſe for tithes, eſpecially *ſmall* tithes, was not proper for this court, and had not been uſed.

Chancery has cognizance of tithes as well as the *Exchequer*.

Sir *John Churchill, amicus curiæ*.

And ſee now ſtat. 7 & 8 *Wil.* III. *chap.* 34. *ſect.* 4. *and ſtat.* 1 *Geo.* I. *ſtat.* 1. *chap.* 6. *ſect.* 2. *and* 1 *Bur. Rep.* 485.

Eaſter Term, 31 Car. II.
A. D. 1679.

In the *Exchequer*.

William Mountague, Lord Chief Baron.
William Gregory.
Sir *Thomas Raymond*.
Sir *Edward Atkyns*.

Sir *Creſwell Levinz*, Attorney General.
Sir *William Dolben*, Recorder of *London*.

Samuel Dod, Clerk, — Plaintiff.
Ralph Ingledon, — Defendant.

In caſe of agiſtment of unprofitable cattle, when the owner of the cattle, or owner of the ground, ſhall pay tithe. 1 Freem. 379. pl. 408.

IF a man agiſt cattle, ſuch as are unprofitable, and yield no tithe in kind, as horſes, *&c.* there, the party who taketh them in, *viz.* the owner of the ground, ſhall anſwer the parſon the tithe, according to the rate he hath for their depaſturing.

But if a man agiſt profitable, and ſuch as yield a tithe in kind, as ſheep that yield tithe wool, and lambs; there the owner of the cattle ſhall anſwer the tithes, becauſe the wool and lamb in kind were due to the parſon; and it is impoſſible, that the owner of the ground could pay that; this difference was taken by Sir *Robert Sawyer*, and agreed to, *by the court*.

The difference taken by Sir *Robert Sawyer*.

Same Caſe,
but not
Same Point.

Decreed upon a bill, by a vicar, in the *Exchequer*, for ſmall tithes, that a pariſhioner ſhall pay every tenth meal only, and not the tenth part of the milk of his cows every meal. *T. Raym.* 277.

THE plaintiff being vicar of *Chigwell* in *Eſſex*, exhibited his *Engliſh* bill, in the *Exchequer* chamber againſt the defendant for ſmall tithes; and

amongſt

amongſt the reſt for tithe milk; and upon the hearing, a queſtion aroſe, whether the defendant ſhall pay the tenth part of the milk of his cows every meal, or only every tenth meal; and it was decreed, that he ſhould pay every tenth meal entire to the plaintiff; for otherwiſe, the plaintiff muſt be forced to keep a ſervant for that ſervice of collecting the milk only, and perhaps the tithe ſhould not amount to a pint a day.

The next queſtion was, whether *de jure* (there being no cuſtom one way or the other) the pariſhioner ought to ſend the tithe milk to the vicar, to his houſe, or that the vicar ought to fetch it from the pariſhioner? The queſtion in the cauſe.

And now, 22 *May* 1679, the vicar brought a civilian, Dr. *Raynes*, to argue, whoſe argument was as follows:

By the *jus commune eccleſiaſticum*, which is the *canon* law, all tithes ought to be brought home to the parſon; and the law is grounded upon the ſcripture, *Malac.* iii. 10. "Bring ye all the tithes into the "ſtorehouſe;" and Saint *Jerome* gives the rule ſo; and *Linwood*, *lib.* iii. *tit.* 16. *De decimis*, *cap.* "*Quia quidam*, *verbo colligendis*," pag. 168. "Colonus de jure "tenetur non ſolum decimas hujuſmodi colligere, "et coarcervare, ſed etiam in horreum ſacerdotis af-"ferre;" and this is certain for predial tithes; and ſo ſays *Speculator* it is for wines; and although there be no expreſs mention of milk, and that milk is reckoned here in *England* amongſt minute tithes; yet in other countries it is a predial tithe. Doctor *Raynes*'s argument, that all tithes ought to be brought home to the parſon.

II. All tithes ought to be paid ſo ſoon as they may be fit for the parſon to receive them; ſo calves at All tithes ought to be paid as ſoon as they are fit for the parſon.

ſuch an age, and other things, as the matter will bear; now it will be very inconvenient, if the milk, which *de jure* is tithable every meal, ſhall be ſent for by the parſon twice a day, and every time may not be a pint.

See the third point, among the points held by the judges under *Michaelmas* Term, 9 *Wil.* III.

The convenience of the church is to be attended to, in the manner of tithing.

III. In the manner of tithing, that which *magis expedit eccleſiæ*, is to be obſerved; and it is more decent for the pariſhioner to bring, than the parſon to fetch his tithes: where the law is ſilent, the cuſtom of the places adjacent prevails: now here all the neighbour vicars have their milk brought home to them.

Court gave plaintiff leave to add parties, and adjourned the cauſe, that they might, by conſideration of their opinions, aſcertain the tithe of milk throughout the pariſh.

Upon hearing this argument, the court thought fit for the plaintiff, if he ſaw cauſe, to inſert all his pariſhioners, or as many of them as he pleaſed, into his bill; and upon their anſwers, the court would deliver their opinion, in order to aſcertain the way of paying tithe milk quite through the pariſh, to prevent multiplication of ſuits; but whether the plaintiff ſhall think fit ſo to do or not, the court adjourned this cauſe to

Michaelmas Term, 31 Car. II.

10 *November*, A. D. 1679.

Opinions of all the barons *T. Raym.* 278. 2 *Freem.* 329. pl. 409.

THE barons now deliver their reſpective opinions, *ſeriatim*.

All

All the barons agreed, and ſo it was decreed, that the tithe milk ought to be carried by the pariſhioners, the Lord Chief Baron *Mountague*, and the other two barons *Atkins* and *Gregory* were of opinion, that there being no cuſtom in the caſe, they ought to reſpect the conveniency of the matter; and therefore it being the uſage in that country to bring their tithes milk and other ſmall tithes to the church porch, becauſe the neighbouring pariſhes did ſo; but *that* Mr. Juſtice *Raymond* ſaid appeared not in the pleadings, and the three barons thought, that the pariſhioners ought to bring their ſmall tithes, it being an indifferent place for that purpoſe; but that the parſon ought to fetch great tithes.

Tithe milk ought to be carried by the pariſhioners. *T. Raym.* 278.

Cuſtom for the gathering tithes ſhould be obſerved. *T. Raym.* 278. 1 *Freem.* 329. pl. 409.

The chief baron, and two other barons agreed, that tithe of milk ſhould be delivered in the church porch. *T. Raym.* 278. 1 *Freem.* 329. pl. 409.

Parſon ought to fetch great tithes. 1 *Freem.* 330.

Raymond was of opinion, that it ſhould be delivered at the vicarage houſe, becauſe tithes are due by the excleſiaſtical law, and by that law ſmall tithes are to be carried * home to the vicar's houſe; and becauſe, where there is no cuſtom, the common law prevails; and therefore he was of opinion, that this court ought to adjudge it ſo.

Raymond was of opinion, that the tithe of milk ought to be carried by the pariſhioners and *delivered* at the *vicarage houſe*. *T. Raym.* 278. 1 *Freem.* 330.

See the caſe of *Watſon* againſt *Lindſel*, under *Eaſter* Term, 6 Geo. I.

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* Tender of tithe cheeſe at the *houſe* of the pariſhioner is good. 2 *Rol.* Rep. 328. *Palm.* Rep. 341. 381. *Ley.* Rep. 68. *Godb.* Rep. 329. *Wiſeman* againſt *Denham*. *T. Raym.* 278. Marg. Suggeſtion that the pariſhioner is to pay the tenth quart of milk, at the *parſonage* houſe, or at any other place, is a good ground for a prohibition, by *Popham*, Chief Juſtice. *Cro. Eliz.* 609. *Mo.* Rep. 909. *Auſtin* againſt *Lucas*. *T. Raym.* 278.

Hilary Term, 32 Car. II
A. D. 1680.

In the *Exchequer*.

William Mountague, Lord Chief Baron.
William Gregory.
Sir *Thomas Raymond*,
Sir *Edward Atkyns*.

Sir *Robert Sawyer*, Attorney General.
Sir *George Jefferys* Recorder of *London*.

Collard againſt *Newton*.

General allegation of diſcharge ſufficient. *Bunb.* 37, 38.

THE defendant inſiſted, that the lands, where, &c. were diſcharged by bull, order, preſcription, or ſome other way, and allowed to be good.

See the caſes of *Page* under *Hilary* Term, 14 and 15 *Car.* II. *Ayder* againſt *Flower*, under *Trinity* Term, 3 *Geo.* I. *Hanking* againſt *Gay*, and others, *Hilary* Term, 5 *Geo.* I.

Eaſter

Eaſter Term, 32 Car II.
A. D. 1680.

In the *Exchequer.*

Woodford againſt *Standfaſt.*

THE queſtion was, Whether clover ſhould pay tithes as hay, and ſhould be within a *modus* of two-pence an acre for all meadow and mowing ground, when the clover ſtands for ſeed, and a great quantity thereof produced.

Court divided on the queſtion, Whether clover ſhould pay tithe as hay.

Note; the court was divided; *Mountague* chief baron, and *Atkins*, that it ſhould be accounted hay; *Raymond* before his removal, and *Gregory* to the contrary; and afterwards *Weſton* inclined that it was not within the cuſtom; but the plaintiff the day after the term prayed to diſmiſs his bill without coſts or prejudice, which was admitted.

MSS. caſes.

See the caſe of *Wallis* againſt *Pain*, under *Hilary* Term, 12 *Geo.* II.

Trinity

Trinity Term, 32 Car. II.

A. D. 1680.

In *Chancery.*

Earl of *Nottingham*, Lord Chancellor.

Sir *Harbottle Grimſtone*, Maſter of the Rolls.

Sir *Heneage Finch*, Solicitor General.

Perne againſt *Oldfield.*

Curate coming in by the ordinary, though neither parſon nor vicar, is capable of tithes. 2 Chanc. Caſ. 32.

THE church of *Crowland* in the county of *Lincoln*, being appropriate to the abbey of *Crowland*, and no vicar endowed, (for ought appears it ſeems that the cure was ſerved by ſome of the monks) the rectory came to the crown; and by meſne conveyances to one Mr. *Chapman*, who gave the rectory, by his will, to the maintenance of a miniſter there for ever, not reſerving the nomination of a miniſter there, nor expreſſing any thing concerning ſuch nomination; the deviſe of the rectory being void at common law, being made to no certain perſon; the eſtate thereof came to Sir *Thomas Orſby* and *Wingfield*, who did appoint and nominate the defendant *Oldfield* to be miniſter and ſerve the cure; afterwards the plaintiff, ſuppoſing a lapſe to the crown, was preſented, inſtituted, and inducted, as if the church had been void; *Orſby* and *Wingfield* rectors, ſuppoſing that the nomination of the miniſter belonged to them, nominated *Oldfield.*

Tithe of fen land lately improved.

Perne ſued the rector for tithes off fen lands improved lately, and gained from the water; they pretend a *non decimando* under the abby; and that *Perne*

the other defendant was not minister; so he pretended, that the tithes belonged to him.

For the plaintiff it was said, that here is a pious use wholly subject to this court, and that *Perne* coming in by the ordinary, though he was not parson or vicar, was allowed by the bishop; and decreed accordingly, that he should have the tithes; but as to the *non decimando*, a trial, &c.

See the case of *Banks* and *Rye*, under *Michaelmas* Term, 1 *Jac.* II. Bishop of *London* and *Beaumont* against *Nicholls*, under *Michaelmas* Term, 10 *Geo.* I. *Jones* against *Barrett*, under *Hilary* Term, 11 *Geo.* I. *Price* against *Pratt*, under *Michaelmas* Term, 3 *Geo.* II.

June 24, A. D. 1680.

In the *Exchequer*.

William Gwavas, Gentleman, — Plaintiff,

William Kelynack, *Richard Richards*, *Philip Kelynack*, and one hundred and sixteen others, parishioners and fishermen, in the parish of *Paul*, in the county of *Cornwell*. — } Defendants.

THE plaintiff was owner of the rectory impropriate of the parish of *Paul*, which is an ancient rectory adjoining to the sea, and extending into

Upon a bill for tithe fish to the impropriator, held, that such tithe was payable by custom, and in kind. 3 *Brown.* 479. pl. 69. *Bunb.* 239. pl. 211. *Id.* 256. pl. 332.

Mount's

Mount's Bay; and hath, time immemorial, been a fiſhing town; and within the ſaid rectory and pariſh there is, and time out of mind been uſed and approved the following cuſtom of tithing fiſh, *viz.*— that every pariſhioner of the ſaid * pariſh, being proprietor or occupier of any fiſhing-boat, net, or other fiſhing craft, uſually tied, moored, or kept within any part of the ſaid rectory or pariſh, when not actually uſed in fiſhing, have paid and ought to pay to the owner or proprietor of the ſaid rectory for the time being, the tenth part of all great and ſmall fiſh taken in the ſaid Bay, or other adjoining ſea or ſeas, with ſuch boats, nets, or fiſhing craft, except only ſuch fiſh as have been uſed for bait to catch other fiſh. The fiſhermen refuſing to pay the tithe of the fiſh ſo taken, becauſe they were hung by the head, as were thoſe taken in the ſleeves of *jaynes*, of which no tithe was paid; thereupon the plaintiff brought his bill in the court of *Exchequer* againſt ſeveral of the fiſhermen for ſuch tithe, charging the cuſtom to be as aforeſaid. And in the fiſhermens anſwer to this bill, they admitted the plaintiff's title to the tithe in kind of hook fiſh, *viz.* the tenth part of what they ſold for freſh, at the price which the owners of the craft paid the fiſhermen for their part, being one half.

The cauſe was heard, many witneſſes having been examined on both ſides, on the 24th of *June*, 1680, and upon a very full † debate, the court declared,

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* *Nota*, The bill alledged the cuſtom to be in inhabitants, *&c.* and not "*or others*," &c. *Bunb.* 257.

† This decree was made upon a very ſolemn hearing, wherein all the then moſt learned counſel in *England* were engaged on one ſide or the other. *Bunb.* 256, 257.

that the plaintiff ought to be paid tithe in kind of all ſuch fiſh taken by the defendants by boats, *&c.* kept in the ſaid rectory; whether taken with * *ſaynes* or drift † nets, or other craft, and that payment of the tenth penny, for which the fiſh were ſold, was in effect payment of tithe in kind, and decreed the defendants to account accordingly; which account was afterwards taken, and upon the report thereof, was confirmed on the 9th of *December*, 1680.

Soon afterwards, the defendants with other of the fiſhermen, to the number of one hundred and ‡ ſixty, ſigned a note or *memorandum* on the back of the writ of execution of the ſaid decree, promiſing

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* Driving nets were ſmall nets about ten fathoms long, and when the fiſhermen went out to take hook-fiſh, they uſually hung at the ſtern of their boat a driving net, againſt which, as the boats croſs the ſea or current, the pilchards ſtruck, and were caught by the head, and thence taken, as occaſion required, to bait their hooks; and if any remained when the fiſhermen came on ſhore, they ſent them home to preſerve for bait for the winter ſeaſon. 2 *Brown.* 480. Drift nets were looked upon as a fraud upon the cuſtom. *Bunb.* 258.

† Theſe *ſaynes* are very long and deep nets, of a cloſe or narrow meaſure, and are uſed in this manner; *viz.* in bright days, perſons called *hewers*, being placed on adjacent hills to diſcover the ſhoals of fiſh, give ſigns to the *ſayners*, or perſons attending the *ſaynes*, whereabout the ſhoals of fiſh are, and then the *ſayners* draw out their *ſaynes*, and encompaſs the fiſh, and draw towards the ſhore; and by degrees the whole ſhoal is, by the ſleeves, guided into the codd of the *ſayne*, and there taken without being hung by the head: but ſometimes it happens, that ſome of the fiſh, being diſtaſted, ſtrike againſt the ſleeves, and there are hung by the head; but being few, and antiently thought not fit to be uſed, were given to the poor fiſhermen for their trouble in taking them out; and the owner of the craft had not part thereof, and therefore no tithes was paid or demanded for the ſame. 2 *Brown.* 480.

‡ One hundred and *thirty only*. *Bunb.* 239. pl. 311.

to

to pay tithes in the words of the decree to the plaintiff, his heirs and aſſigns.

See this caſe, under *Trinity* Term, 1 *Geo.* II. and under *Michaelmas* Term, 2 *Geo.* II. and the caſe of Earl *Scarborough* againſt *Hunter*, under *Eaſter* Term, 6 *Geo.* I.

July 8, A. D. 1680.

In *Chancery.*

Pomfret againſt *Lander*, *Wait*, and others.

Clover graſs tithable as hay. Lord chief baron *Dodd's* manuſcript Rep. cited in *Bunb.* 344. pl. 424.

LUTON in *Bedfordſhire*: Tithes of clover graſs threſhed, and made into horſe bread, and hogs fed with the ſeed; yet adjudged to be hay, and titheable to the vicar, who was endowed with hay, and not to the uſe of the impropriator, as a new or different tithe from hay.

See the caſe of *Wallis* againſt *Pain*, under *Hilary* Term, 12 *Geo.* II.

Michaelmas

Michaelmas Term, 1 *Jac.* II.
A. D. 1686.

Banks and *Rye.*

THIS was a bill brought for tithes by a ſequeſtrater, only *while* the vacancy was ſupplied; and the bill was diſmiſſed.

Bill by a ſequeſtrator during a vacancy, diſmiſſed. *Bunb.* 141. in marg.

See the caſes of *Perne* againſt *Oldfield*, under *Trinity* Term, 32 *Car.* II. Biſhop of *London*, and *Beaumount* againſt *Nicholls*, under *Michaelmas* Term, 10 *Geo.* I. *Jones* againſt *Barrett*, under *Hilary* Term, 11 *Geo.* I.

Somerſet againſt *Fotherby.*

THE bill being to examine witneſſes *in perpetuam rei memoriam* to prove a *modus decimandi*, the defendant demurred, for that the bill was to eſtabliſh a cuſtom againſt the church, and in prejudice of tithes, that are due *of common right*; and ſeveral precedents were cited, where bills to have a *modus* decreed, were, upon a demurrer, diſmiſſed; but this bill being only to preſerve teſtimony, the Lord Keeper thought it reaſonable the defendant ſhould anſwer, and over-ruled the demurrer.

Bill lies to perpetuate the teſtimony of witneſſes to prove a *modus*. 1 *Vern.* 185, pl. 114. But *quære* if it will lie to eſtabliſh a *modus*.

Hilary Term, 2 & 3 Jac. II.
A. D. 1687.

In the *Exchequer*.

Sir *Edward Atkyns*, Lord Chief Baron,
Sir *Richard Heath*.
Chriſtopher Milton.
Sir *Thomas Jenner*.

Sir *Robert Sawyer*, Attorney-General.
Sir *John Holt*, Recorder of *London*.

Croſman and *Goodrick*.

Value of tithes, aſcertained by plaintiff's oath, on conſent, where bill for tithes taken *pro confeſſo*. *Bunb.* 26.

UPON payment of the coſts, the value of the tithes was aſcertained by the oath of the plaintiff himſelf, by conſent, the bill for tithes being taken *pro confeſſo*, the defendant having ſtood out till a ſequeſtration.

See the caſe of *Baily* againſt *Peaſly*, under *Trinity* Term, 5 *Geo.* I.

Trinity

Trinity Term, 3 Jac. II. A. D. 1688.

In the *Exchequer.*

Sir *Edward Atkyns*, Lord Chief Baron.
Chriſtopher Milton.
John Retheram.
Charles Ingoldby.

Sir *Thomas Powis*, Attorney General,
Sir *John Holt*, Recorder of *London.*

Chitty againſt *Reeves.*

IT was reſolved, that the tithes of hops are not to be paid till after they are picked, and before they are dried, every tenth meaſure.

Tithes of hops not payable till after picked, and before they are dried. *Bunb.* 20.

See the caſes of *Bliſs* againſt *Chandler*, under *Michaelmas* Term, 7 *Geo.* I

Eaſter Term, 4 Jac. II. A. D. 1689.

In *Chancery.*

George Baron of *Wem*, Lord Chancellor.
Sir *John Trevor*, Maſter of the Rolls.
Sir *George Treby*, Solicitor General.

Buxton againſt *Hutchinſon.*

THE plaintiff's bill was to be relieved for tithe oar in *Braſſington*, a townſhip within the rectory of *Blackborne*, in the county of *Derby.*

Tithe oar not due, but by particular cuſtom. 2 *Vern* 46. pl. 43.

By the court. Tithe ore is not due of common right, but by particular cuſtom only; and the court therefore directed a trial to be had at law, whether there was any and what cuſtom, within the ſaid townſhip for the payment of tithe ore, with direction for the judge to endorſe the *poſtea*, how the cuſtom was found upon the trial.

See the caſe of *Brown* againſt *Vermuden*, under *Trinity* Term, 28 *Car.* II.

Term, Jac. II.

In the *Exchequer.*

The ſeed and ſtalk of *cinquefoil* to pay tithe as graſs. Cheſ. baron *Dodd*'s MSS.

THIS caſe was before the Lord Chief Baron *Mountague*, *viz.* arable land pays tithe in kind, to the impropriator, *cinquefoil* was ſowed upon this land, and it ſtood to ſeed, and the profit was in the ſeed, and not in the ſtalk; there was a cuſtom of two pence an acre for hay, payable to the vicar; and it was reſolved, that notwithſtanding the ſtalk and ſeed were in nature of corn, yet it ſhould be looked upon, as graſs, and payable accordingly.

Eaſter

Eaſter Term, 1 Wil. and Mary.
May 13, A. D 1690.

In *Chancery.*

Sir *John Maynard*, Sir *Anthony Keck*, and Sir *William Rawlinſon*, Serjeants at Law, Lords Commiſſioners for the cuſtody of the Great Seal of *England.*

Henry Powle, Maſter of the Rolls.
John Somers, Solicitor General.

Bentham againſt *Alſton.*

Diſpute between parſon and his predeceſſor's leſſee, reſpecting the apportionment of rent for tithes. 2 *Vern.* 136. pl. 134.

THE plaintiff was ſucceſſor to a parſon, who had made a leaſe to the defendant of his tithe and glebe, for *three* years; *two* years and an half expired in the life-time of the leſſor, and the leſſee had taken the profits of the whole year in the parſon's life-time, who died before the laſt rent-day; the plaintiff's bill was to have that half-year's rent; ſee ſtat. 28 *Hen.* VIII. chap. 11. the plaintiff had not made the executor of his predeceſſor a party. *By the court*, Diſmiſs the bill.

28 *Hen.* VIII. chap. 11.

Hilary Term, 2 Wil. and Mary.

January 28, A. D. 1690-1.

In *Chancery*.

Same Caſe.

Incumbent of a parſonage, being old, he, together with the grantee of the next avoidance, join in a leaſe of the tithes, rendering the rent half yearly; incumbent dies before firſt half year; leſſee gathered in the tithes, except a ſmall part, which he got in afterwards. Who ſhall have the rent? 2 *Vern.* 204. pl. 188.

DOCTOR *Tudor* the incumbent, having leaſed the rectory and tithes to *three* of his pariſh, at three hundred and twenty pounds a year, for three years, rendering rent half yearly, at *Midſummer* and *Chriſtmas*; the doctor being old, the leſſees, upon taking a new leaſe, deſired the plaintiff, who had a grant of the next avoidance, to join therein, that they might be ſure to enjoy their bargain, who agreed accordingly. Doctor *Tudor* died before *Midſummer* the laſt half-year's day, the leſſees having firſt collected and got all, or greateſt part of the tithes, &c.

The plaintiff in equity would have had a decree for the half-year's rent; firſt, becauſe he was bound by the agreement; for if the doctor had died before any tithes collected, yet he was bound, and muſt have permitted the leſſees to have enjoyed; and ſecondly, becauſe the leſſees had received ſome tithes after the death of Doctor *Tudor*, which was an evidence, that they looked upon their leaſe, as continuing, and acted under the agreement made by the plaintiff.

But it was objected, if the rent was payable to any one, the executors of Doctor *Tudor* had a better right than the plaintiff, and they no parties.

By the court. Of opinion in the old books, that the fee is in the patron, during the vacancy, and a

releaſe to him alone is good, recommended it to the parties to make an end of it by compromiſe.

In the *Exchequer*.

Sir *Robert Atkyns*, Knight of the Bath, Lord Chief Baron.
Nicholas Letchmere.
Sir *John Turton.*
Sir *John Powell*, of *Glouceſter.*

Sir *George Treby*, Attorney General.
Sir *Bartholomew Shower*, Recorder of *London.*

Edge againſt *Oglander.*

A *Modus* of eight pounds for a farm of eighty pounds a year, was allowed to be a good *modus*.

Modus of 8*l.* for a farm of 80*l.* a year, good. *Bunb.* 302.

In the *Exchequer*.

Saunders, Vicar of *Charlton Hathern*, in the county of *Somerſet*, againſt *Ryall.*

A Vicar being endowed of the ſmall tithes, and four acres of glebe, leaſed this glebe to the defendant, who ſowed it with corn; then the vicar dies, and the plaintiff being inſtituted and inducted, preferred his bill for the tithe corn, which the defendant had carried off. *By the whole court*; tithe ſhall be paid, but the queſtion is to whom? the impropriator being intitled to great tithe. By *Letchmere* and *Powell:* the vicar ſhall have it, for the endowment of the glebe carrieth all the profit along with it; *Turton* baron, *contra*, that the impropriator ſhall

Vicar intitled to corn ſown by his predeceſſor's leſſee. Chief Baron *Dodd*'s manuſcript.

Impropriator intitled to the great tithes; endowment of glebe carries all the profit thereof.

Lands diſcharged only in hands of the vicar.

ſhall have them, for the land is only diſcharged of the great tithes in the hands of the vicar; but decreed for the vicar, in the abſence of the chief baron.

Trinity Term, 3 Wil. and Mary, A.D. 1692.

In the *Exchequer*.

Stump againſt *Ayliffe*.

The King's books concluſive evidence, as to the value of a living. Chief Baron *Dodd*'s MS.

THE defendant to a tithe bill *inſiſted*, that the plaintiff had taken a ſecond *living* of above eight pounds a year; but by the court, defendant decreed to account; for though the real value is above eight pounds, yet in the King's books (which is the concluſive rule) it is under. See *Dy.* 237. Cr. *El.* 853. Cr. *Car.* 456. *S. Degge*, 29.

See the caſe of *Pugh* againſt *Paſcall*, under *Trinity* Term, 11 *Wil.* III.

Pettit againſt *Churley*.

Quære, whether alienage a good plea to a bill for tithes. Chief Baron *Dodd*'s MSS.

PLEA to a tithe bill, that the plaintiff was a *Frenchman*, and not capable of a benefice by ſtatute; which is printed in *Raſtal. The court doubted.* See *Rol.* Abr. Tit. Preſentment. 348.

Berwick againſt *Swanton*.

Sequeſtrator cannot bring a bill alone for tithes. *Bunb.* 192. n.

IT was reſolved, that a ſequeſtrator could not bring a bill alone for tithes; becauſe he is a bailiff, and accountable to the biſhop, and has no intereſt.

Hilary

Hilary Term, 3 Wil. and Mary.

Feb. 20, A. D. 1692-3.

In the *Exchequer.*

Sir *Robert Atkyns*, Knight of the Bath, Lord Chief Baron.

Nicholas Lechmere.

Sir *John Turton.*

Sir *John Powell.*

Sir *John Somers*, Attorney General.

Sir *Salathiel Lovel*, Recorder of *London.*

Buckle and *Vanacre.*

Billets and faggots pay tithe. *Bunb.* 99. n.

UPON a bill for tithe-wood in *Erith* in *Kent*, about twenty years growth, part uſed for timber, and part made into billets and faggots; Reſolved, That the laſt ſhall pay tithes, for the trees being above twenty years growth *alone* will not privilege them, but the uſe.

See the caſe of *Greenaway* againſt the Earl of *Kent*, under *Hilary* Term, 8 *Geo.* I.

Eaſter

Eaſter Term, 4 Wil. and Mary. A. D. 1693.

In the *Exchequer.*

Wild againſt *Alton.*

Vicar not intitled to tithes without endowment; chaplain not intitled to them. Chief Baron *Dodd*'s MSS.

THE plaintiff was leſſee of the impropriation and manor of *Kempſey*, in the county of *Worceſter*, in which there is a vicar endowed. — *Stoulton* is a vill therein, and has a chapel of eaſe, and the inhabitants hire a curate or chaplain to ſay prayers, and give him a ſalary; the bill was for tithe hay in this vill; the defendants, the inhabitants, inſiſted, that the chaplain had the tithe hay, and that they had agreed with him for the tithes; upon debate, it was reſolved *by the court*;

1. That tithe hay is payable in this caſe, and ſo admitted by the defendants.

2. That either the parſon or vicar muſt have it, and not in this caſe the vicar, becauſe he does not pretend to be endowed of it.

3. That the chaplain is too uncertain a perſon, and has too uncertain an intereſt, to be capable of it, for he is put in and removed at pleaſure.

See the cauſe of *Perne* againſt *Oldfield*, under *Trinity* Term, 32 *Car.* II. *Price* againſt *Pratt*, under *Michaelmas* Term, 2 *Geo.* II.

In

In the *Exchequer.*

Daniel againſt *Tuffnall.*

RESOLVED, That if the occupier ſows turnips, and then agiſts the ſheep of a ſtranger, or fattens his own ſheep; and ſells them, he ſhall pay tithe for the herbage, or agiſtment, notwithſtanding the turnips are ſowed on the fallow ground (as they were in this caſe) and meliorate the land for corn; ſo alſo, if the turnips are ſold, and profit made, tithe ſhall be paid for them.

Occupier ſows turnips, and then agiſts the ſheep of a ſtranger, or fattens his own, and ſells them; he ſhall pay tithe for the herbage or agiſtment; though the turnips are ſowed on fallow ground, and meliorate it for corn
Chief Baron *Dodd's* MSS.

See the caſe of *Eachard* againſt *Brown*, under *Hilary* Term, 8 *Wil.* III.

Hilary Term, 5 Wil. and Mary. A. D. 1694.

In the *Exchequer.*

Taſwell, Parſon of *Woodnorton*, in the county of *Norfolk*, againſt *Athill.*

A. SELLS the toppings and loppings of oak, aſh, and elm to *B.* ſtanding; *B.* cuts them down; the parſon brought his bill for tithes, againſt *A.* and *B.* Reſolved,

Leſſee of uncut toppings and loppings, of oak, aſh, and elm, not liable to pay tithe for them.
Chief Baron *Dodd's* MSS.

I. That the bill, as againſt *A.* who ſold them uncut, be diſmiſſed, notwithſtanding the caſe of *Franklin*, againſt *Jones*, 2 *Jac.* II.

II. That without a cuſtom they are not tithable.

III. That

III. That notwithſtanding the ſtatute of *ſilva cædua*, they may be titheable by cuſtom, and directed an iſſue to try the cuſtom.

Eaſter Term, 6 Wil. III.
A. D. 1695.

In the *Exchequer*.

Wilbraham againſt *Saunders*.

No tithe herbage for *treſpaſſing* cattle. Chief Baron *Dodd's* MS.

A'S farm adjoins to *B.*'s in the pariſh of *C.* the fences of *B.* being down, *A.*'s cattle eſcape there, and eat there in the pariſh of *C.* for four months.

Reſolved, That the parſon of *C.* ſhould not have tithe herbage, for they are as treſpaſſers; and *Letchmere* cited the parſon of *Bangor's* caſe, that tithes ſhall not be paid for cattle which *par cauſe de vicinage*; but *Powell contra*, in the preſent caſe, *A.* is a diſſeiſor, and ſhall pay tithes; for it is not an accidental treſpaſs, but a continued act; *but it ſeemed clearly the contrary to Mr.* DODD *the reporter*.

Trinity Term, 6. Wil. III.
A. D. 1695.

In the *Exchequer*.

Anſell againſt *Adman*.

Ancient mill pays no tithe. *Bunb.* 184.

RESOLVED, that an ancient mill pays no tithes.

See *ante* 14. See the caſe of *Dodſon* againſt *Oliver*, under *Eaſter* Term, 8 *Geo.* I. *Chapman* againſt *Barlow*, under *Michaelmas* Term, 11 *Geo.* I.

Hilary

Hilary Term, 6 Wil. III.
A. D. 1694-5.

In the *Exchequer.*

No Lord Chief Baron.
Nicholas Letchmere.
Sir *John Turton.*
Sir *John Powell.*

Sir *Edward Ward,* Attorney General.
Sir *Salathiel Lovel,* Recorder of *London.*

Hawkins and Chittle.

Non-payment of tithes, a presumptive evidence, that land is discharged by the endowment. Chief Baron *Dodd's* MSS.

THE impropriator brought his bill for the tithes in the like case as that of *Saunders* against *Ryal,* [which see under *Hilary* Term, 2 *Wil.* and *Mary,*] but the point was not then determined; because it appeared, that the glebe had been heretofore leased; and the lessee had paid no tithes; and therefore, the court presumed, that *non* payment was an evidence, that the land was discharged of tithes, by the endowment, and dismissed the bill. See *Cro. Eliz.* 579. *Hob.* 188. *S. Degge.* 200.

Easter

Eaſter Term, 8 Wil. III.

May 26, A. D. 1696.

In the *Exchequer*.

Sir *Edward Ward*, Lord Chief Baron.
Nicholas Letchmere.
Sir *Lyttleton Powis*.
Sir *John Blencowe*.

Thomas Trevor, Attorney General.
John Hawles, Solicitor General.

Edwyn Sandys, Clerk, — Plaintiff.
Joſeph Eaſtmond, executor of *Henry Eaſtmond*, and *Samuel Nayle*, } Defendants.

Agiſtment tithe of herbage, to be paid for oxen and unprofitable cattle, as well not uſed as uſed for the plough, for the time they are grazed and fatted for ſale, after turned off, from the plough *Skew.* Caſ. in Parl. 192.

THE caſe was no more than this; the pariſh of *Yeovilton*, conſiſting much in paſture land, and the plaintiff having been rector thereof for twenty years laſt paſt, and upwards, and being intitled to the great and ſmall tithes, and all other dues, within the ſaid rectory, he did exhibit his bill in this court againſt the defendant *Joſeph*, in his own right, and as executor of *Henry* his father, and againſt the other defendant, *Samuel Nayle*, for agiſtment tithes, for depaſturing and fattening their oxen, and other unprofitable cattle, within the ſaid rectory, from the year 1677, to the time of exhibiting his bill, which was in *Michaelmas* Term, 1692.

The defendant *Joſeph Eaſtmond*, by his anſwer, admitted, that he had aſſets ſufficient to anſwer the plaintiff's demands; and both of them admitted, that they and the teſtator had fatted and depaſtured divers

divers oxen yearly upon their lands in the ſaid pariſh, but ſaid, that ſome of them were firſt uſed to the plough, and afterwards fatted, when turned off from the plough.

The court of *Exchequer* did thereupon, *viz. May* 26, 1696, decree tithe herbage to be paid for the defendants and the teſtator's oxen and unprofitable cattle, not uſed for the plough, and alſo for their oxen and unprofitable cattle, uſed for the plough, for and during the time they were grazed and fatted in the pariſh for ſale, after they were turned off, from the plough; which decree was affirmed upon the following appeal.

In the *Houſe of Lords.*

Joſeph Eaſtmond, executor of *Henry Eaſtmond*, and *Samuel Nayle*, --- } Appellants.

Edwyn Sandys, Clerk, --- Reſpondent.

IT was inſiſted on, in favour of this appeal, that the decree was unjuſt; and then were quoted ſome texts of ſcripture about muzzling the ox, *&c.* and alſo it was urged, that that part of the decree concerning oxen once uſed to the plough, was erroneous; and there were cited all the caſes in the books for exemption of plough cattle from tithe herbage, and that this was double tithing; and it was inſiſted on, that the reaſon of the thing was againſt it in this caſe, becauſe the agiſtment of theſe cattle was neceſſary to ſuſtain that labour, which promoted the gain of which tithe was paid; that this privilege extended to all ſuch oxen, as ever had been uſed

Show. Caſ. in Parl. 192, 193.

uſed to the plough; that the exemption did continue, after they were forborne to be uſed at the plough; for there was the ſame reaſon to continue the exemption afterwards, as there could be to allow it, during the interval, when they did not draw the plough; and theſe and other reaſons urged, it was prayed, that the decree for tithe, *as to* ſuch cattle as ever had been uſed with the plough, ſhould be reverſed.

On the other ſide, it was urged, that the decree is agreeable to the law, and ſupported by many reſolutions in the court of *Exchequer*, that there was a reaſon for tithe in this caſe; becauſe theſe cattle, though formerly uſed to the plough, ceaſed now to belong to it, and conſequently tithes became due; that there is a difference in the nature of the thing; for when the cattle feed in order to labour, the parſon hath a tenth of the benefit produced thereby; but when they are fatted only for ſale, it is otherwiſe.

That this was a ſettled, and allowed difference in the *Exchequer*, that while the oxen are working, no tithe ſhall be paid for their feeding, becauſe there are tithes of other things, ariſing by the labour of ſuch cattle; but when they do no work, and are turned off to be fatted, and are grazed, there tithes ſhall be paid for the herbage which they eat, they being no way beneficial to the parſon, in any other tithes; and many caſes in the *Exchequer*, were cited to warrant this diſtinction; and it was ſaid, that none could be alledged to the contrary; wherefore it was prayed, that the decree might be affirmed,

Decree affirmed. and it was affirmed.

Trinity

Trinity Term, 7 Wil. III.
A. D. 1696.

In the *Exchequer.*

Sir *Edward Ward*, Lord Chief Baron.
Nicholas Letchmere.
Sir *John Turton.*
Sir *Littleton Powys.*

Sir *Thomas Trevor*, Attorney General.
Sir *Salathiel Lovel*, Recorder of *London.*

Medly againſt *Talmy.*

BILL by the leſſee of the Provoſt, *&c.* of *Eaton*, of the impropriate tithes of *Leominſter* in the county of *Suſſex*, for the tithe of corn and hay; the defendant inſiſts, that his lands by ſome lawful means are diſcharged; and that in 1652 he bought the lands, and all tithes.

Though the tenant cannot preſcribe in *non decimando*, yet, againſt a lay impropriator, the court will preſume, no tithes having ever been paid, that they were granted to the tertenant; and alſo a grant, and look upon them, as tithe free. Chief Baron *Dodd's* MSS.

Upon the hearing, the *court* declared, that though the tenant could not preſcribe in *non decimando*; yet that againſt a lay impropriator, they would preſume tithes granted to the tertenant, no tithes having ever been paid; and that they would look upon them as tithe free; and though the occupier could not ſhew any grant, yet *non* payment would preſume a grant; and the bill diſmiſſed by the Chief Baron *Ward*, and *Powys.*

See the caſes of Sir *John Hockins*, Doctor *Hickeringhill*, which, it is ſaid, are *contrary.*

See *Thorngate* againſt *Wallop*, under *Trinity* Term, 11 *Wil.* III. *Stone* againſt *Rideout*, under *Hilary* Term, 1 *Geo.* II.

Hilary Term, 7 Wil. III.
A. D. 1696.

In the *Exchequer.*

Stephens againſt *Martin.*

Tithes of peaſe and beans never paid to vicar, but always to the impropriator, unleſs an endowment or uſage to the contrary; and affirmed in the lords.

DETERMINED, That tithes of peaſe and beans are never paid to the vicar, but always to the impropriator, without an endowment or uſage to the contrary; and this decree was affirmed upon an appeal to the Houſe of Lords. *Bunb.* 169, 170.

See the caſes of *Nicholas* againſt *Ellis* under *Hilary* Term, 10 *Ann.* and under *Hilary* Term, 4 *Geo.* I. and of *Gumley* againſt *Burt*, under *Trinity* Term, 11 *Geo.* I.

Michaelmas

Michaelmas Term, 8 Wil. III.
A. D. 1697.

In the *Exchequer*.

Sir *Edward Ward*, Lord Chief Baron.
Nicholas Letchmere.
Sir *Littleton Powys*.
Sir *John Blencowe*.

Sir *Thomas Trevor*, Attorney General.
Sir *Salathiel Lovel*, Recorder of *London*.

Poole againſt *Draper* and *Oſborne*.

IN a bill for tithes againſt two, the defendants make two ſeparate defences, and decree againſt them both, with ninety pounds coſts taxed; it was moved, that the coſts might be ſeparated, being ſeveral cauſes in effect, and different dues decreed; and ſo ſaid to be done, 25th *Nov.* 1693, in the caſe of *Liſter* againſt *Captain*, but the court would not now do it.

Coſts in a cauſe againſt ſeveral defendants, though they defend ſeverally, will not be ſeparated. Chief Baron *Dodd's* MS.

Hilary Term, 8 Wil. III.
A. D. 1697.

In the *Exchequer*.

Bayfield, Rector of *Chiddington*, in the County of *Surry*, againſt *Antecknap*.

THREEPENCE a lamb, adjudged a void *modus*, being too rank; the *court* refuſed to direct an iſſue to try the *modus*, becauſe void.

Modus of threepence for a lamb too rank, and no iſſue directed, for a void *modus*. *Dodd's* MSS. 3 *Burn's* Eccleſ. Law, 412. S. C. and S. P.

The court held, the *modus* could not be; for that a lamb was not then worth two ſhillings and ſixpence in that country.

February 24, A. D. 1697.

In the *Exchequer.*

Eachard againſt *Brown*, and others.

Tithe due for turnips on land not ſevered. Chief Baron *Dodd's* MSS.

BILL by the vicar of , in the county of *Suſſex*, for ſmall tithes *(inter alia)* for turnips, which he plucked up, and carried into another field, (I ſuppoſe in the ſame pariſh) and there fed his cattle and hogs on them. *B.* had ten roods growing, and did not ſever them; and decreed, that *B.* ſhould pay tithe for the turnips, becauſe not ſevered. *Quære*, and

See the caſe of *Daniel* againſt *Tuffnall*, under *Eaſter* Term, 4 *Wil.* and *Mary.*

Trinity Term, 9 Wil. III. A. D. 1698.

In the *Exchequer.*

Harris againſt *Adge.*

Where tithe has been paid, court will preſume the reading of the articles. Chief Baron *Dodd's* MSS.

THE *court* preſumed, that the plaintiff had read the articles, where tithe had been paid; though this was the defendant's defence.

Michaelmas

Michaelmas Term, 9 Wil. III.
A. D. 1698.

In the *Exchequer.*

Sir *Edward Ward*, Lord Chief Baron.
Nicholas Letchmere.
Sir *Littleton Powys.*
Henry Hatſell.

Sir *Thomas Trevor*, Attorney General.
Sir *Salathiel Lovel*, Recorder of *London.*

Anon.

IN a cauſe, where a parſon preferred a bill for tithes, theſe points were held by the judges:

No tithes of hop poles, or of their bark. 1 *Freem.* 334. pl. 426.

1. Where the parſon had tithe hops, no tithes ſhould be paid for the poles, which were uſed in the hop-yard; and a queſtion aroſe, whether the parſon ſhould have tithes of the bark of the poles, the bark being ſold? and by *Letchmere*, he ſhould; but the *chief baron*, and the other *barons e contra*; for the poles being privileged, the bark ſhall be ſo too.

Tithe of fuel to dry hops.

2. That for fuel ſpent in fire to dry hops, tithes ſhould be paid; becauſe the parſon had no benefit by that, the tithes being paid before they were dried.

How ſoon tithes ſhould be paid. 1 *Freem* 335. Corn and hay.

3. That tithes ought to be paid, as ſoon as the tenth part can be well ſevered from the nine, if there be no cuſtom to the contrary; and ſo it is for corn and hay, as ſoon as it is made into ſhocks or cocks.

In the time of *Hen.* I. *Herbert* bishop of *Norwich* grants to the prior and convent of *Norwich* * "*Ferias quas Rex* Willielmus *fratribus donavit, in hebdomadâ Pentecostis*, &c. Lakenham, *cum omnibus rebus quæ ad eandem pertinent vallam, præter terram* Osberti *archidiaconi* Ameringhale, *medietatem silvæ de* Thorp, &c. But this seems rather a confirmation of the grant of *Hen.* I.

A. D. 1121, *Edward* bishop of *Norwich*, confirms to them † "*Omnia quæ predecessores mei dederunt, & similiter quicquid* Herbert *de* Ross *habuit in* Lakenham, &c."

A. D. 1646, *William* bishop of *Norwich* confirms to them ‡ "*Omnia quæ* Herbertus *episcopus* Norvicensis, *aut* Everardus *episcopus* Norvicensis, *donavit, & quicquid* Herbert *de* Ross *habuit in* Lakenham."

A. D. 1200, *John de Grey*, bishop of *Norwich*, grants to the prior and convent of *Norwich* § "*Ecclesiam* Lakenham, *cum omnibus, ad eandem pertinentibus*, &c. *administrari per capellanos suos, salvo nobis, & successoribus nostris, jure pontificali & parochiali.*

16 *Hen.* III. *A. D.* 1232, an *inspeximus*, and confirmation of the grants of King *William* II. and *Hen.* I.

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* "Those holidays which King *William* allowed to the brotherhood, in *Whitsun* week, &c *Lakenham* with all things belonging to the same vale, besides *Ameringhale*, the land of archdeacon *Osbert*, and a moiety or half part of the wood of *Thorp*," &c.

† "All that my predecessors gave, and likewise whatever *Herbert* of *Ross* had in *Lakenham*," &c.

‡ "All that *Herbert* or *Everard*, respectively bishops of *Norwich*, gave, and whatever *Herbert* of *Ross* had in *Lakenham*."

§ "The church of *Lakenham*, with all appertaining to the same, &c. to be served by their own chaplains, saving to us, and our successors, all pontifical and parochial rights."

wherein

wherein they grant * "*manerium de* Lakenham, Ameringhale, *medietatem ſilvæ de* Thorp, *&c.*"

A. D. 1273, confirmation by Pope *Gregory* to the monks of *Norwich* of a grant of the church of *Lakenham*; and by the valuation of eccleſiaſtical benefices, 20 *Ed.* I. and 26 *Hen.* VIII. it appears, that the cure was ſerved by the monks, who received an annual penſion by charter 30 *Hen.* VIII. the king † "*Cœnobium de priore conventu eccleſiæ cathedralis, Sanctæ* Trinitatis Norvici *tranſpoſuit & mutavit in decan, & capitulum eccleſiæ cathedralis ſanctæ* Trinitatis Norvici;" and incorporates the dean and chapter, and grants them all the poſſeſſions of the priory. See 3 *Co.* 73.

The dean and chapter having by this grant the manor of *Lakenham*, and likewiſe the church of *Lakenham*, as being part of the poſſeſſion of the prior and convent, by leaſe 2 *Jan.* 33 *Hen.* VIII. *A. D.* 1541, demiſed to *Robert Flint* the ſcite of the manor of *Lakenham*, and all the lands belonging, except the mills and woods, for years, and covenanted, that the leſſee ſhall have the tithes of his cattle going on the ſaid demeſnes; and that the dean and chapter will diſcharge him of all tenths, *&c.*

1 *March*, 1 *Edw.* VI. by indenture, the dean and chapter, in conſideration that *Robert Flint* had been

* "The manor of *Lakenham*, *Ameringhale*, a moiety of the wood of *Thorp*," &c.

† "Tranſlated and changed the monaſtery of the priory, *&c.* from a convent of the cathedral church of Saint *Trinity*, *Norwich*, into the dean and chapter of the cathedral church of Saint *Trinity*, *Norwich*."

at

at great charge in building and repairing the houſes, demiſed to him *Lakenham* woods; and it is declared, that whereas he held the manor of *Lakenham*, (that is to ſay, the ſcite of the manor and demeſne lands by the leaſe 33 *Hen.* VIII.) which is ſaid had been always freed from the payment of tithes predial and perſonal in the hand of the farmers; the meaning was, that he ſhould hold the ſaid manor of *Lakenham* diſcharged of all manner of ſuch tithes; and by the ſame indenture, the dean and chapter demiſed to him the tithes of hay and corn growing on the ſaid demeſnes for ninety years.

3 *June*, 1 *Ed.* VI. the dean and chapter ſurrendered their poſſeſſion to the king, who by letters patent, 9 *Nov.* 6 *Ed.* VI. grant to the dean and chapter, * "*Omnia illa maneria noſtra de* Hindlenoſton, *&c. viginti maneria in com.* Norf. *acetiam omnes illas rectorias & eccleſias noſtras de* Hindlenoſton, *&c.* Laken-

* "All thoſe our manors of *Hindlenoſton*, &c. twenty manors in the county of *Norfolk*; and alſo all thoſe our rectories and churches of *Hindleſton*, &c. *Lakenham*, &c. twenty-five rectories in the county of *Norfolk*, &c. and alſo advowſons, donatives, rights of preſentation, in the ſaid aforeſaid vicarages, churches, and every of them; and moreover all and ſingular our manors, meſſuages, *&c* rents, *&c* glebes, tithes, oblations, obventions, penſions, corodies, advowſons, rights of preſentation, profits, and hereditaments whatſoever, in the towns, *&c.* of *Hindleſton*, *Newton*, &c. *Lakenham*, &c. to the aforeſaid cathedral church heretofore belonging; except however, and reſerving to us, our heirs, and ſucceſſors, the manor of *Hemilby*, and the rectories and advowſons of the vicarage of *Wykelwood*, in the county of *Norfolk*; and moreover, all and ſingular the meſſuages, lands, tithes, rents, and hereditaments in *Hemingſby*, *Lakenham*, &c. or elſewhere, in the ſaid manor of *Hemilby*, *Lakenham*, &c. or to any of them in any wiſe belonging; and except all lands, *&c.* and tithes lying in *Eaton*, and aſſigned to the manor of *Lakenham*, out of the ſaid manor of *Eaton*, and out of the ſaid manor of *Ameringhale*, and late in the tenure of *Robert Flint*."

ham,

ham, *&c. viginti quinque rectorias in com.* Norf. *&c. acetiam advocationes, donationes, jura patronatus vicariarum prædictarum eccleſiarum, & earum cujuſlibet; necnon omnia & ſingula maneria, maſſuagia, &c. reddit, &c. glebas, decimas, oblationes, obventiones, penſiones, portiones, advocationes, jura patronatus, proficua, & hereditamenta noſtra quæcunque, in villis, &c. de* Hindlenoſton, Newton, *&c.* Lakenham, *&c. in com.* Norf. *&c. ad dictam eccleſiam cathedralem dudum ſpectant' Except' tamen, & nobis, hæredibus, & ſucceſſoribus noſtris, reſervat' maner' de* Hemilby *ac rectoriâ & advocatione vicariæ de* Wykelwood *in com.* Norf' *necnon omnibus & ſingulis meſſuagiis terris, decimis, redditibus, & hereditamentis, in* Hemingſby, Lakenham, *&c. aut alibi, dict. maner' de* Hemilby, Lakenham, *&c. ac rector. de* Hemilby, *ſeu eorum alicui, quoquomodo ſpectant. ac except. omnibus terris,* &c. *decimis, jacentibus in* Eaton, *ac aſſignat' maner' de* Lakenham, *extra dict' maner' de* Eaton, *ac extra dict' maner' de* Ameringhale, *ac modo in tenur'* Roberti Flint.

By patent, 1 *July*, 7 *Edw.* VI. the king grants to *Thomas Graham*, Eſquire "* *Maneriam de* Lakenham, *ac tot' rector' & eccleſiam de* Lakenham, *ac advocationem, & jus patronatus, vicariæ eccleſiæ ibi,* &c. *ac omnia & ſingula meſſuagia, grangias,* &c. *glebas,* &c. *ac decimas garbar. blader. granor. fœni, et connabi, ac al' decimas quaſcunque in* Weſtacre, Lakenham, *&c. dict' maner' et eccleſiæ, ſeu eorum alicui ſpectant,* &c.

* "The manor of *Lakenham*, and the whole rectory and church of *Lakenham*, with the advowſon, and right of preſentation, to the vicarage of the church there, *&c.* and all and ſingular the meſſuages, farms, *&c.* glebe, *&c.* and tithes of corn, graſs, grain, hay, and and other tithes whatſoever in *Weſtacre, Lakenham*, &c. belonging to the ſaid manor and church, or to either of them."

Ward

2 *Brown*, 420. *Com.* Rep. 501. 4 *Brown*, 235.

Ward anſwered the ſaid bill, and this term the court directed *Ward* to pay *Folchier* the vicarial tithes in kind, for the ſaid lands; but, by the minutes taken on the hearing of the cauſe, the tithe of hay was expreſsly excepted, that being a great, and not a vicarial tithe.

Tithe of hay is a great and not a vicarial tithe.

See the caſe of *Fox* againſt *Berkley*, under *Eaſter* Term, 8 *Geo.* II. and under *Michaelmas* Term, 9 *Geo.* II.

Trinity Term, 11 Wil. III.
A. D. 1700.

In the *Exchequer*.

Dowdeſwell, Rector of *Kingham* in *Oxfordſhire*, againſt *Harker*.

Wood may be exempt from tithe by cuſtom. Chief Baron *Dodd's* MS.

WOOD, though burnt in the houſe, generally ſpeaking, ſhall pay tithes, but may be exempt by the cuſtom of the pariſh. *Moor*. 909. *Cro. Car*. 113. *Sid*. 447. *Rol. Abr*. 644.

Pugh againſt *Paſcall*.

Inſtitution into a rectory with cure, is void. Chief Baron *Dodd's* MSS.

PLAINTIFF vicar of *Mack-Baddow*, in the county of *Eſſex*, brought his bill for tithes. The defendant ſaid it was a vicarage with cure of ſouls, above eight pounds a year; and that the plaintiff, before the time in the bill mentioned, was inſtituted and inducted into the rectory of *Shoreham* in *Eſſex*, (being a benefice with cure) without qualification.

On

On the hearing, it appeared,

1. That the Biſhop of *London* had inſtituted the plaintiff into this rectory, *without cure*; and by the court, plaintiff has not accepted a rectory with cure; and if it is a rectory with cure, the inſtitution is null and void: but *quære*, for the inſtitution may be good, and the words "*without cure*" null and void.

2. That the defendant in this ſuit, (as the plaintiff had done the work, and this was but in nature of wages) he could not take advantage of it: and on *nil debet* on ſtatute of 2 and 3 *Edw.* VI. chap. 13. the defendant could not take advantage of this; but *quære* for DODD *contra*.

See *Stamp* againſt *Ayliffe*, under *Trinity* Term, 3 *Wil.* and *Mary*.

Thorngate againſt *Wallop*.

No tithe having ever been paid, though not ſo alledged in the bill, yet diſmiſſed. Chief Baron *Dodd's* MSS.

THE plaintiff, as farmer of the impropriate rectory of *Huſburn Priors*, and Saint *Mary Brame* in *Southampton*, brought his bill for the tithes of hay and wood; the defendant inſiſted, that the Biſhop of *Winton* had the firſt month of four acres in *Honey Mead*, and other meadows in the pariſh, occupied by him; and that no tithes in kind were ever paid; and then, as to the wood, he never heard that any tithes were ever paid for that; and it formerly belonged to the priory of *Huſburn*; and being ſo veſted in the church, is exempt from payment of any tithes.

On the hearing of the cauſe, it appeared, that theſe woods and meadows belonged to the hoſpital of Saint *Swithin's* in *Winton*, and came to the crown, 30 *Hen.* VIII. and though the defendant had not ſo ſet

it forth, and for the meadow, had made another defence; yet no tithe having ever been paid, the court diſmiſſed the bill.

See the caſe of *Medly* againſt *Talmy*, under *Trinity* Term, 7 *Wil.* III. *Stone* againſt *Rideout*, under *Hilary* Term, 1 *Geo.* II.

Hunt againſt *Codrington:*

Teaſalls adjudged a ſmall tithe, and to belong to the vicar. Chief Baron *Dodd's* MSS.

BILL, by the farmer of impropriation, for the the tithe of teaſals planted, and afterwards uſed by clothiers, (note, it appeared they were firſt planted in this pariſh of *Congreſburgh*, in the county of *Somerſet*, about forty-five years ago), though immemorially in other places; and the tithe always ſince paid to the impropriator; and four ſucceſſive vicars in all this time never demanded or received the ſame; but as the vicar was endowed of all ſmall tithes, the court adjudged this a ſmall tithe, and belonged to him, in regard the time of planting it was known; and diſmiſſed the bill.

See the caſe of *Twiſſe* and *Brazennoſe* college, under *Trinity* Term, 15 *Car.* II.

Trinity

Trinity Term, 1 Anne,

June 22, A. D. 1702.

In the *Exchequer*.

Sir *Edward Ward*, Lord Chief Baron.
Sir *Thomas Bury*.
John Smith.
Robert Price.

Edward Northey, Attorney General.
Sir *Salathiel Lovel*, Recorder of *London*.

Thomas Horton . — Plaintiff.

John Hartington, *Richard Mackwite*, and *John Ratcliffe*, } Defendants.

THE manor, demeſne lands, and parſonage of *Bedminſter* and *Ratcliff*, in the county of *Somerſet*, have immemorially belonged as a crops to the prebendary of the prebend of *Bedminſter* and *Ratcliff*, in the cathedral church of *Sarum*; and having been uſually leaſed out for lives, were, for above one hundred years, held by Sir *Hugh Smith*, Baronet, and his anceſtors, as leſſees thereof; who had beſides, a very large eſtate of inheritance, laying within the impropriation.

In a ſuit for tithe hay, the defendants, by their anſwer, only ſet up ſeveral *moduſes* under the name of *ſtrew* tithes; an iſſue in this caſe proper to try, whether the *moduſes* inſiſted on by the defendants, in their anſwer, have been time out of mind paid and payable, for, and in lieu of, tithe hay in kind. 1 *Brown* 140, pl. 41.

In order to ground an exemption from the payment of tythe hay in kind, the *Smiths* agreed with their tenants, to accept a yearly compoſition for the tithe hay, ariſing out of their reſpective farms, amounting in the whole to three pounds, fourteen ſhillings and five-pence, payable yearly, on *Good Friday*;

Wood muſt be uſed in building to exempt it from tithe; but *quære* the law.

3. The chief baron, and *Bury* held that aſh fallen, of above twenty years growth, and uſed for the plough and cart, ſhall pay tithe; but the other two barons *contra*; and ſo the point was carried; the chief baron and *Bury* inſiſting, that the wood muſt be uſed in building, to exempt it; but *quære the law.*

Why milk is paid every tenth meal.

4. The chief baron ſaid, that milk is to be paid every tenth meal, for neceſſity and convenience.

See the caſes of *Perch* againſt *Gee*, under *Hilary* Term, 9 *Wil.* III. *Greenaway* againſt the Earl of *Kent*, under *Hilary* Term, 8 *Geo.* I.

Eaſter Term, 3 Anne, A. D. 1704.

In the *Exchequer.*

Biſhop againſt *Arundel.*

Modus of twenty-ſix ſounds a year for a farm, allowed, *quod mirum!* Lord Chief Baron *Dodd*'s MS. S. C. cited in *Bunb.* 301.

PLAINTIFF rector of *Tarent Kington*, in the county of *Dorſet*, brought a bill for tithes; the defendant inſiſted upon a *modus* of twenty-ſix pounds a year, for a farm called "*Tarent's* farm" but ſet out no value of the farm, nor did the plaintiff prove any. The court reſolved,

1. That if the plaintiff would avoid the *modus*, as unreaſonable in value, it lay upon him to prove the value of the farm; and not neceſſary for the defendant to make it reaſonable, in reſpect of the value.

2. That the *modus* was not on the face of it void, in reſpect of it's largeneſs, and being for a farm ONLY; nor

nor would the court permit the value to be inquired into, but generally directed the *modus* to be tried.

N. B. The reporter ſays *quod mirum!* for he never knew a twenty-ſix pound *modus* before.

Michaelmas Term, 3 Anne.
A. D. 1704.

In the *Exchequer*.

The Archbiſhop of *York* againſt the Duke of *Newcaſtle*.

H. preſcribed to pay ten fleeces of wool, and two lambs in lieu of all tithes; and *Price* and *Bury*, barons, were of opinion this was an ill *modus*; becauſe it is one *kind* of tithe for another, and there is great incertainty, for one fleece may be twice as big, and three times the value of another; *Ward* chief baron, and *Smith* baron, *contra*.

Court divided, whether a *modus* of ten fleeces of wool, and two lambs, for all tithe, good or not. 2 *Salk.* 656. pl. 3.

Firſt. A *modus* is nothing but a real compoſition, for, or in lieu of tithes, or an annual profit certain and permanent; and they held, that the payment of any one chattel for tithe, was or might be a good *modus*, as well as money; for why might not the parſon originally agree to take ten fleeces for his tithe, as well as a penny? They admitted, that payment of tithe of one *kind*, or payment of a *modus* for one *kind* of tithe, could not be a diſcharge, as to another *kind*; but they held, that this was not a payment of tithe; becauſe it was to be paid at all events, whether there be ſheep or no; and they denied the caſe

Payment of tithes of one kind, not a good *modus* for all.

of 1 *Rol.* Abr. 651. and held it no more uncertain, than to pay a *modus* of ten cheeſes, which may differ vaſtly, both in nature, quantity, and value; and it tends to the diſquiet of the country, to break in upon cuſtoms and uſages; and it ought not to be done, but on plain and manifeſt reaſon.

Lord Chief Baron *Dodd* reports the caſe thus.

Lord Chief Baron Dodd's MS.

The Archbiſhop of *York*, and *B.* againſt the Duke of *Newcaſtle*, and Lord *Cheſterfield*.

BILL for tithes of the rectory of *Kilburn*, againſt the farmers of part of the abbey of *Ryland*; theſe ſeveral *moduſſes* were debated;

I. Ten fleeces of wool, and two lambs and an half-penny or eighteen pence for half a lamb, payable at *Midſummer*, in lieu of all tithes ariſing on *Beſomworth's* Farm; chief baron, and *Smith*, that it is a good *modus*, for it is not in diſcharge of wool and lamb only, but of all tithes; and any thing of a titheable nature, may be given in diſcharge of tithes, as well as money, as an acre of land, &c. and the difference is, where it is in diſcharge of the *ſpecies* of tithe, and where of the land, *Littl.* ſect. 144. *Noy*, 148. *Dy.* 349, b. *Hob.* 44, 45.

But by *Price* and *Bury contra*; for it is titheable matters for tithes, *Cro. Eliz.* 446. 471. *Mo.* 554. 1 *Rol.* Abr. 649. 651. *Hardr.* 174. *Cro. Car.* 276. *Rol.* Rep. 120. *Hob.* 39. ſix fleeces of wool and three lambs in lieu of ſmall tithes of *Canterdale* farm. This *ut ſupra.* —— 3. Three fleeces of wool and four ſhillings, in lieu of all tithes for *Rowland's* farm, good, by the chief baron, *Price*, *Smith*; *Bury*, *contra*.

Eaſter

Eaſter Term, 5 Anne.

April 12, A. D. 1706.

In the *Exchequer*.

John Newte, Clerk, — Plaintiff.

Roger Chamberlain, and *Francis Plympton*, — } Defendants.

THE plaintiff was rector and incumbent of the portions of *Pitt* and *Titcombe*, in the borough and pariſh of *Tiverton*, in the county of *Devon*; and was intitled, as ſuch, to tithes of corn, grain, wood, and all other great tithes.

The tithe of corn, ground in an horſe malt mill, is a perſonal tithe, and due only, where it has been paid within forty years before; and not payable by the tenth toll diſh of the corn ground, but by a tenth part of the clear profits, over and above all incident charges. 1 *Brown.* 157. pl. 45. 9 *Vin.* Abr. 39. pl. 5. 1 Eq. Caſ. abr. 366. pl. 3. *Gr. & Rud.* Law and Eq. 338. pl. 6.

About the year 1693, the mayor and burgeſſes of *Tiverton*, erected a mill, for grinding malt by horſes, within one of the ſaid portions, and on 8 *May* 1699, they demiſed the ſame to the defendants for three years, from *Midſummer* then next, at the rent of thirty pounds *per annum*.

The leſſees refuſing to pay, or compound with the plaintiff, for any tithes in reſpect of the malt ground at this mill, he in *Michaelmas* Term, 1704, exhibited his bill againſt them in the Court of *Exchequer*, praying an account and ſatisfaction of ſuch tithes. The defendants by their anſwer inſiſted, that no tithes were due.

On * 20 *February*, 1705, the cauſe was heard and debated, that all conſultations and denials of prohibitions were in point. 2 *Rol.* Rep. 84. 1 *Brownl.* 72.

9 *Vin.* Abr. 39. pl. 5.

Lord Chief Baron *Dodd's* MS.

* On *Apr.* 12, 1706, according to *Brown.*

3 *Bulſtr.* 212. 1 *Rol.* Abr. 656. 652. 2 *Inſt.* 490. 1 *Rol.* Abr. 405. 2 *Inſt.* 622. *Cr. Jac.* 523, 524.

Chief Baron. That a mill built on abbey lands that were diſcharged ſhall pay tithes. *Sed quære.* And by *Ettrick*; where there is a *modus* for the land, or lands are diſcharged of tithes, a new mill erected on them, ſhall not pay tithes. 2 *Inſt.* 490. 1 *Rol.* Abr. 651. a.

In the caſe of *Hall* againſt *Hart*, in B. R. *Holt* cited the caſe of *Hughes* againſt Lord *Hereford*, where, in Lord *Hale*'s time, it was adjudged, that as to old mills, they may may preſcribe in *non decimando*.

1 *Brown*, 157. pl. 45.

The court decreed that the defendants ſhould account with, and ſatisfy, and pay unto the plaintiff, for the value of the tenth toll-diſh of all corn and grain, ground at the ſaid horſe malt mill, for the two firſt years, in the bill mentioned, *viz.* from the 8th of *May* 1699, to the 8th of *May* 1701, and ſhould alſo pay the coſts of the ſuit.

This decree was reverſed on appeal.

See the caſe of *Chamberlain* againſt *Newte*, under *Hilary* Term, 4 *Anne*. *Chapman* againſt *Barlow*, under *Michaelmas* Term, 10 *Geo.* I.

Trinity Term, 5 Anne.
June 23, A. D. 1706.

In the *Exchequer*.

Samuel Gardiner, Clerk, — Plaintiff.
John Pole, Eſquire, —— Defendant.

Twelve-pence an acre for low meadows, and eight-pence an acre for high meadows, in lieu of tithe-hay, held to be good *moduſes*. 1 *Brown*, 214. pl. 58. 9 *Vin.* Abr. 18. pl. 47.

THE pariſh of *Eckington*, in the county of *Derby*, of which the plaintiff and his father had been rectors for upwards of ſixty years, conſiſts of a town called *Killamarſh*, and of four quarters, called by the names of *Spinkill*, *Moſbrough*, *Eckington* and *Troway*; and for time immemorial, there have been, within this pariſh, certain yearly *moduſes*, rates, or real compoſitions, in lieu of tithe-hay, *viz.* twelve-pence an acre, for all low meadows, and eight-pence an acre, for all high meadows, (except in *Troway* quarter) for every year, that the ſame were reſpectively mowed for hay; and for *Troway* quarter ſeveral ſmall ſums for every farm, amounting to about one hundred and ten pounds.

The defendant being poſſeſſed of lands in the town of *Killamarſh* and in *Spinkill* quarter, the plaintiff, in *Hilary* Term, 1704, exhibited his bill againſt him in the court of *Exchequer*, for an account, and ſatisfaction of tithe-hay in kind, to which the defendant, by his anſwer, inſiſted upon the ſaid antient *moduſes* of twelve-pence and eight-pence an acre, and that the ſame had been paid time out of mind, in lieu of tithe-hay, and ſo accepted by the plaintiff, and all his predeceſſors, rectors of the ſaid pariſh.

The cauſe being at iſſue, ſeveral witneſſes were examined on both ſides, and being heard on the 23d of *February*, 1705, the court took time to conſider, till the 23d of *June*, 1706, when they declared, that the ſaid payment of twelve-pence and eight-pence an acre, were no *moduſes*, but temporary compoſitions, and that tithe-hay ought to be paid in kind for theſe lands, for which the ſaid compoſitions were alledged to be payable, and therefore decreed the defendant to account with, and ſatisfy the plaintiff, for his tithe hay, with coſts.

But this decree was reverſed, on appeal.

See the caſe of *Pole* and *Gardiner*, under *Hilary* Term, 5 *Anne*.

Hilary Term, 5 Anne.

February 5, A. D. 1706.

In the Houſe of Lords.

John Harrington, Richard Mackrill, and *John Ratcliff*, } Appellants.

Thomas Herton, —— Reſpondent.

1 *Br.* Ap. in Parl. 140. pl. 41.

FROM the decree of the court of *Exchequer*, pronounced *June* 22, 1702, [ſee *Herton* and *Harrington*, under *Trinity* Term, 1 *Anne*,] the defendants appealed, contending, that an iſſue ought firſt to have been directed, to try whether tithe hay in kind was, of right, due or payable within the pariſh. That the reſpondent's father, for twenty years and upwards, and Sir *Hugh Smith* and his anceſtors, for above one hundred years before, received tithe-corn, and all other tithes in the pariſh; but

forgot, for all that time, to aſk for ſo valuable a part, as the tithe of hay; which, if it had been really due, ſeemed very improbable, and ſcarce to be credited. And though many debts at law are loſt by length of time, and a demand is, in moſt caſes, neceſſary to preſerve the right to a duty; yet, the only foundation of this decree in equity, was the length of time, without any demand, ſo that the laches of the reſpondent's anceſtor, which ought to be for the advantage of the appellants, turned out to their manifeſt prejudice.

On the other ſide, it was inſiſted, that tithes in kind are due of common right; and that there was no proof in the cauſe ſufficient to ſupport the *moduſes*, as laid in the anſwer; for tithes in kind were proved to be paid for ſome of the lands, alledged to be covered by theſe *moduſes*, and as to the other farms, the cuſtomary payments were proved to be different from thoſe mentioned in the anſwer; and ſome of the lands were deſtitute even of the pretence of a *modus*. And, as to the objection, that there ought to have been a trial at law, it was anſwered, that the court of equity does not ſend any fact to be tried at law, but where it is rendered doubtful by a contrariety of evidence; but, as the appellants had wholly failed in proving their *moduſes*, there was no foundation to ſend any one of them to ſuch a trial.

But, after hearing counſel on this appeal, it was ordered and adjudged, that the decree complained of, ſhould be ſo far reverſed, as, the ſeveral iſſues ſhould be tried in the proper county, at the next ſummer aſſizes; whether the ſeveral *moduſes* inſiſted on by the now appellants, in their anſwer in the court below, have

Decree reverſed. Lords *Journ.* vol. 18. p. 227

have been time out of mind paid, and payable, for and in lieu of tithe-hay in kind, and that the court of *Exchequer* ſhould proceed upon the iſſues directed as ſhould be juſt: And, if any difference ſhould ariſe between the parties in ſettling the iſſues, it was ordered, that they ſhould apply to Mr. Baron *Price*, to ſettle the iſſues ſo to be tried.

For the caſe and the original decree in this cauſe; ſee *Horton* and *Harrington*, under *Trinity* Term, 1 *Anne*.

Hilary Term, 5 Anne.

February 17 *, A. D. 1706.

In the Houſe of Lords.

Roger Chamberlain and *Francis Plympton*, —— } Appellants.

John Newte, Clerk, —— Reſpondent.

9 *Vin.* Abr. 39. pl. 5. 1 *Br.* Ap. in Parl. 157. pl. 45.

THE defendants in the *Exchequer* appealed to the Houſe of Lords; becauſe,

1. The tithe of an horſe-mill is a perſonal tithe, for there is no natural encreaſe from it, but only a profit ariſing from the invention of a machine, and the labour of a man and horſe; and if it is perſonal, the ſame can only be for the tenth of the neat profit, deducting all charges.

2. If a perſonal tithe be due for ſuch mill, it is only due where perſonal tithes have been by cuſtom paid for forty years before the ſtatute of 2 & 3 *Edw.* VI. chap. 13.

2 & 3 *Edw.* VI. chap. 13.

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* *Feb.* 20. according to Gr. & Rud. of Law and Eq. 338. pl. 6.

3. Though the appellants only took two-pence a buſhel for grinding, yet the reſpondent did not prove any cuſtom, nor the value of the tenth toll diſh, nor any other toll to be taken by the appellants.

4. That the tenth toll diſh would be more ſometimes than the whole proprietor's gains, conſidering the expence of erecting and *repairing* this mill.

5. That the corn will pay tithe twice, for that moſt of the corn that was ſo ground, was grown within the ſame pariſh, and ſo the tenth paid to the reſpondent in the field; and if any was ground that grew elſewhere, the ſame did in like manner pay the tenth, to the incumbent, where it grew.

6. This decree will introduce a new ſort of tithe, and will affect a great many people in *London*, where there are many ſuch mills, and ſome thouſands of them are in other parts of the kingdom; and if this decree be affirmed, they muſt all pay tithes.

On the reſpondent's part, it was inſiſted,

1. That tithes were due both by the canon and ſtatute law, for new-erected mills; that tithes were by the canons due for all mills; and by *Articuli Cleri*, chap. 5. for new-erected mills, which expreſsly provides, that no prohibition ſhall lie in ſuch a caſe. *Artic. Cler.*

2. That there had been from time to time ſeveral reſolutions and decrees for tithes of mills.

3. That the reſt of the mills within the reſpondent's portions, had all along paid, and did ſtill pay tithes

tithes for the ſame; and every *modus* for a mill proves tithes to be due, if they were not diſcharged by ſuch *modus*.

4. That it was a predial tithe, and the tenth toll-diſh payable for the ſame; and ſo was both the canon, cuſtom, and uſage of this kingdom.

5. That this was not a double tithe, for it was paid by different perſons, and for different purpoſes; *viz.* in the firſt caſe, by the owner of the corn; and in the ſecond caſe, by the owner of the mill.

This caſe was heard at the bar of the Houſe of Lords, *Monday* 20 *January*, 1706-7, and upon ſome debate in the Houſe, the conſideration, if tithes predial, mixt or perſonal, were due for ſuch a mill, and if any due, in what manner payable, was referred to the judges; who, after ſeveral adjournments, attended in the Houſe on 17 *February* following, and all the judges of the *King's Bench* and *Common Pleas* (except Juſtice *Powell*) were of opinion unanimouſly, that the tithes due for a new-erected malt-mill was a perſonal tithe only; and Chief Juſtice *Holt*, and Chief Juſtice *Trevor*, that there was no tithe due at all for ſuch mill, becauſe a perſonal tithe was due only, where it had been paid within forty years before, according to the ſtatute of 2 & 3 *Edw.* VI. chap. 13. ſect. 7. upon which the lords reverſed the decree of the *Exchequer*, but ordered, that Mr. *Newte* ſhould be paid the tenth part of the profits, &c. deducting all charges and expences, as reparations, &c. and that the appellants ſhould account with him in the court of *Exchequer* for theſe profits, &c.

Monday,

Monday, 17 *February*, 1706.

Upon due conſideration of what was offered by counſel, and upon hearing the judges, it was ordered and adjudged that the decree complained of, ſhould be reverſed, and that the plaintiff in the court below, *John Newte* (the now reſpondent) ſhould recover his tithes of the ſaid mill, in the nature of perſonal tithe only; that is to ſay, the tenth part of the clear profits ariſing from corn ground in the ſaid mill, over and above all incident charges; and to that end, an account was to be taken of the profits of the ſaid mill and charges for the time paſt, within the time of the plaintiff *John Newte*'s bill in the *Exchequer*, and ſince; and that the ſaid tithes ſhould ſo continue to be paid for the future; and it was ordered that the ſaid court of *Exchequer* ſhould cauſe the ſaid account to be taken, and what ſhould be found due thereon, paid accordingly.

1 *Br.* Ap. in Parl. 157. pl. 45. 9 *Vin.* Abr. 40. 18 vol. of the Lords Journals, 84.

N. B. Dodd was of opinion with the Judges of *B. R.* and *C. B.* and in judgment againſt his own client.

Lord Ch. Bar. *Dodd*'s MSS.

For the caſe and the original decree, ſee *Newte* and *Chamberlain*, under *Eaſter* Term, 3 *Anne*; and ſee *Chapman* againſt *Barlow*, under *Michaelmas* Term, 10 *Geo.* I.

Michaelmas Term, 5 Anne. A. D. 1706.

In the *Exchequer.*

Pemberton againſt *Beckwith.*

Fraudulent manner of tithing, diſtinguiſhed from an unequal manner. Chief Baron *Dodd's* MSS.

UPON a tithe bill it appeared, that the defendant had ſhorne his ſheep, and laid the wool up in an heap, and ſet eight fleeces for the plaintiff; and when his tithe-gatherer came, told him, there was the tithe, but would not let him either break up or tell the heap, and the man took them, but ſaid he took them in part, and that they were not his maſter's full due; alſo, as to the lambs, the defendant had a field in another pariſh, and took out ſome lambs for that, and then the reſt were tithed; but the defendant took out two, and bid the parſon's man take out a third, for his tenth lamb; but he inſiſted he ought to take a ſecond, yet he took a third, but ſaid it was not right, and his maſter would ſue.

Upon the hearing, the court decreed *for the plaintiff*, and that the wool and lamb ſo taken ſhould go but in part, and be allowed upon the account as part only, and is not like the caſe where corn is tithed unequally, and the tithe taken; there the parſon ſhall be bound, and cannot afterwards falſify, or take only in part. *Quære* the diverſity, but ſo aſſerted by the chief baron *moſt vehemently.*

Hilary

Hilary Term, 5 Anne.

March 10, A. D. 1706.

In the Houſe of Lords.

John Pole, Eſquire, —— Appellant.
Samuel Gardiner, Clerk, Reſpondent.

FROM this decree the defendant appealed; inſiſting, that the *moduſes* were good in law, having been inviolably obſerved, and being fixed and certain, and what might be permanent; that there was not any rule in law to ſtint or limit the value of *moduſes*, they were all originally contracts proceeding from compoſition real, which were frequently made till the ſtatute 13 *Eliz.* chap. 20. which was above 350 years after the time of *Richard* I. That the owner of the pariſh might have endowed a church with more than the value of the tithes, if he had thought fit, or might have contracted for twenty times leſs than the value; and in this, and moſt other caſes, an inviolable uſage is the ſole evidence of right, when by length of time, no account of the reaſon, or beginning of the uſage, can be given; and therefore it is called a preſcription. That the reaſon given for making this decree, was, that the *moduſes* in queſtion were too great, or near the value of the tithe in kind, for that in the time of King *Richard* I. which was accounted the time of memory, twelve-pence or eight-pence might be the value of the inheritance of an acre of meadow; but, according to this reaſoning, a farthing an acre would ſcarce be adjudged a good *modus*; although there were late judgments of the court of *Exchequer*, which confirmed four-pence an acre for marſh land, in *Kent*, and ſome which allowed ſix-pence an acre, in

Decree reverſed, 1 *Br.* Ap. in Parl. 214. pl. 58. Lords Journals, 18 vol. 503.

Time of memory.

in other places. That it was evident, both from the reaſon and the uſage of the Alienation Office, that, in ancient times, meadow lands were of much greater value than of late years, which was owing to the modern invention of improving other lands, ſo as to bear hay: that moſt parſons quarrelled with a *modus* of twelve-pence or ſix-pence for a farm of twenty or thirty pounds *per ann.* and by the unwarineſs of ignorant tenants, in making ſmall alterations, got them ſet aſide; ſo that within few years paſt, more *moduſes* had been broken than for many ages before, while very few had been complained of, which were half, or near the value of the tithe; but if this decree ſtood, ſeveral hundreds of the pariſhes would be unhinged in all their inviolable *moduſes*, and manner of tithing, and a multiplicity of ſuits and endleſs confuſion would be created throughout the kingdom.

On the other ſide it was contended, that the tithe hay in kind is to be paid to every rector, of common right, unleſs ſome ancient *modus* be payable in lieu thereof; but that the ſums pretended to be *moduſes* in this caſe, could only be temporary agreements or compoſitions, by reaſon of their largeneſs; for, in ancient times, when *moduſes* were introduced, the ſums of twelve-pence and eight-pence were of much greater value than the hay of a whole acre. That there were ſeveral inſtances in proof in this cauſe, both in the time of the reſpondent and his predeceſſors, when ſometimes the pariſhioners had refuſed to pay, and at other times the incumbent had refuſed to receive, theſe ſums of twelve-pence and eight-pence an acre; and, at all thoſe times, tithe hay had been paid in kind; that in all the neighbouring pariſhes, the rectors uſually compounded with their pariſhioners for the tithe hay, at the like rates of

twelve-pence and eight-pence an acre, yet they had the tithe hay paid them in kind, whenever they thought fit, without any pretence; that theſe payments were *moduſes*. That, conſidering ſo ſmall a ſum as eleven ſhillings was paid for tithe hay of *Troway* quarter, containing one hundred acres, and ſo great ſums as twelve-pence and eight pence for every acre of the other quarter of the pariſh, no other reaſon could be given for the difference, but that one was an ancient *modus*, and the other a later compoſition.

But after hearing counſel on that appeal, it was ordered and adjudged, that the decree ſhould be reverſed; it appearing to their Lordſhips, that the appellant had proved the *moduſes* inſiſted on by his anſwer; and that the reſpondent's bill in the court of *Exchequer* ſhould ſtand diſmiſſed, but without paying any coſts to the appellant; his ſolicitor and agent conſenting, at the bar of the houſe, to waive ſuch coſts.

For the caſe and original decree in this cauſe, ſee *Gardiner* and *Pole*, under *Trinity* Term, 4 *Anne*.

of the right or privilege of feeding upon this common.

The defendant rented one farm in the parish of *Kirby-cane*, and another in the parish of *Stockton*; and he constantly paid his full tithes, to the respective rectors of those parishes, without any abatement, in respect of his feeding his cattle upon the said common. The defendant also occupied five acres of meadow, in the parish of *Ellingham*; for which there was payable a *modus* of twopence an acre; and which had accordingly been paid, or tendered to the plaintiff, as rector of that parish.

But in *Easter* Term 1707, the plaintiff thought proper to exhibit his bill in the court of *Exchequer*, against the defendant, for tithe herbage of this meadow ground; and also, for the tithe of the feed of his cattle on the said common, called *Mickle-fenn*; suggesting, that he the plaintiff was well intitled to those tithes. To this bill the defendant put in an answer, and thereby insisted on the *modus* of twopence an acre for the meadow ground, which he was ready to pay; but as to the other demand, he stated, that the inhabitants of the respective parishes adjoining to the common had, time out of mind, paid tithe for their cattle fed thereon, to the incumbent of the parish, where the owner of such cattle lived; and where, in the winter season, they were kept; that he had paid tithe for his cattle fed upon the said common, to the incumbent of *Kirby-cane*, in which parish he lived, and to the rector of *Stockton*, where his other farm lay; and that he had two parcels of *dole* land in *Gelston* common, where he had a right to feed cattle, and cut alders; but could not come at those lands, without driving over that part of the common, called *Mickle-fenn*, which lay in the said parish of *Ellingham*.

On

On the 21 *July* 1709, the cauſe was heard; when the court was pleaſed to decree, that the defendant ſhould account for the tithes of his cattle fed upon that part of *Miklefenn* common, which lay in the pariſh of *Ellingham*; and alſo for the *modus* of twopence an acre, for his meadow land, in that pariſh; there being proof, that the cattle were driven upon that part of the common that lay in *E.*

Gr. and *Rud.* Law and Eq. 338. pl. 7.

This decree was reverſed on appeal. See the next caſe.

Hilary Term, 7 Anne.

February 10, A. D. 1709-10.

In the *Houſe* of *Lords.*

Henry Mickleburgh, — Appellant.
Samuel Criſp, Clerk, — Reſpondent.

FROM the decree pronounced by the court of *Exchequer*, in this cauſe, *July* 21, 1709, [which ſee in *Criſp* and *Mickleburgh*, under laſt Term] the defendant appealed; inſiſting, that tithes had never been paid, nor were any due to the reſpondent, as rector of *Ellingham*; for the appellant's cattle fed upon that part of the common, called *Micklefenn*, which lay in the ſaid pariſh; and therefore, the appellant ought not to have been decreed to account for ſuch tithes; for in that caſe, he would pay his tithes twice over; and ſuch payment would create perpetual ſuits and controverſies, as well between the parſons, as the pariſhioners of the ſaid ſeveral pariſhes; and as to the *modus* of twopence an acre, the appellant never conteſted, or denied payment of it; but on the contrary, was always ready and willing to pay

1 *Br.* Ap. in Parl. 278 pl. 72. 9 *Vin.* Abr. 43. pl. 6. *Gr.* and *Rud.* of Law and Eq. 338. pl. 7.

it; and, that, therefore, in this reſpect, the bill ought to have been diſmiſſed, with coſts.

To this it was anſwered, that the appellant's cattle, for which the tithes were decreed, were dry barren and unprofitable cattle; and not by law titheable to the miniſter of the pariſh, where the owner lived, for the time they were fed in the reſpondent's pariſh; but to the reſpondent, as miniſter of the pariſh where they were fed; and therefore the ſuggeſtion of paying double tithes, was groundleſs. That if the reſpondent ſhould not have tithes, for the feed of theſe cattle, upon the lands, within his pariſh; the herbage of all the paſture land therein, might be eaten by the cattle of ſtrangers, without his receiving any ſatisfaction for the ſame; and there would be a *non decimando* for the feed of the appellant's cattle, during the time they were fed in the reſpondent's pariſh; becauſe, for that time, the miniſter of the pariſh, where the appellant lived, could have no pretence of right to ſuch tithes.

Decree reverſed. Journals, 19 vol. 63.

But after hearing counſel on this appeal, the queſtion was put, whether the decree ſhould be reverſed. And being reſolved in the affirmative, it was ordered and adjudged, that the decree of the court of *Exchequer*, in the appeal complained of ſhould be reverſed; becauſe the cuſtom, that every farmer ſhould pay tithes to the rector, where he lived, was good, there being no incloſure, and that the plaintiff's bill in the court of *Exchequer* ſhould be diſmiſſed, without prejudice to his right to the *modus* of two-pence an acre, for the five acres of land in *Ellingham*.

Gr. and *Rud.* Law and Eq. 338. pl. 7.

See the caſe and original decree, in *Criſp* and *Mickleburgh*, under *Trinity* Term, 7 *Anne*.

Michaelmas

Michaelmas Term, 8 Anne.
A. D. 1709.

In the *Exchequer.*

Wright againſt *Elderton.*

THE plaintiff, vicar of *Stepney*, brought his bill for ſmall tithes. Reſolved, That he generally having taken the tithe of turnips ſowed, but not thoſe ſowed after the corn reaped, nor thoſe paid to any parſon, that the plaintiff ſhall not have them; and cited the caſe of *Berry* and *Bridges*, where decreed accordingly; but *Price contra*; and that it ſhall be intended, he was endowed of the whole, and not a partial endowment.

Tithe not to be paid of turnips, after the corn reaped. Chief Baron *Dodd's* MSS.

Hilary Term, 10 Anne.
A. D. 1711.

In the *Exchequer.*

Mathew Nicholas, Clerk, Vicar of *Shalford*, — } Plaintiff.

Elliot, a farmer of the great tithes, Defendant.

The ſame again *Auſten.*

MATTHEW NICHOLAS, clerk, vicar of *Shalford*, preferred his bill in this court, againſt the defendant *Elliot*, the farmer of the impropriate rectory, (among other things) for the tithes of peaſe and beans; and alſo preferred his bill in the ſame

Farmer and impropriator, decreed to pay the tithes of beans and peaſe, to the vicar. *Bunb.* 19. pl. 24.

court afterwards, againſt *Auſten* the defendant in the other cauſe, the impropriator; and had a decree for the ſame, though it was inſiſted by the defendants, that the vicar was only intitled to the tithes of peas and beans ſet and planted in rows and ranks, that have been hoed and weeded with the land, where the ground has been turned with the ſpade, as well in open fields, as in gardens; but not where they have been ſet in rows and ranks, and hoed and weeded with the hand, where the ground has been turned only with the plow.

See theſe caſes under *Trinity* Term, 2 *Geo.* I. *Hilary* Term, 3 *Geo.* I. and *Gumley* againſt *Burt*, under *Trinity* Term, 10 *Geo.* I.

Trinity Term, 11 Anne.

July 2. A. D. 1712.

In the *Exchequer.*

Bohn againſt *Lee.*

Modus of one ſhilling in the pound, yearly, in lieu of all ſmall tithes, void for uncertain y. Chief Baron *Dodd's* MSS.

PLAINTIFF vicar of *Lyd*, in the county of *Kent*, brought his bill for ſmall tithes; the defendant inſiſted on a *modus*, *viz.* that the occupiers of marſh meadow or paſture lands, have uſed and ought to pay yearly, for all their marſh, meadow, and paſture lands, by them occupied, to the vicar, in lieu and ſatisfaction of the tithe of hay, lambs, wool, calves colts, pigs, eggs, honey, wax, fruit, agiſtment, and all other ſmall tithes, ariſing on their ſaid lands, the yearly rate or ſum of one ſhilling in the pound; and

and ſo in propoſition for every greater or leſs ſum than a pound, according to the yearly value of ſuch lands, as are rented or let at a full or rack rent, without fine; and on a caſe ſtated, it was reſolved,

That it was a void *modus* for the uncertainty, and impoſſibility of the parſon knowing the value without annual and conſtant ſuits. See 11 Rep. 16. *Hob.* 11. 3 *Mod.* 73. *Cro. Car.* or *Eliz.* 621. 671. 2 *Leon.* 127. 2 *Keb.* 280. 318. *Latch.* 210. *Sid.* 49. 3 *Mod.* 132. *Godolph.* Rep. 425. *Hob.* 602. *Leon.* 127.

See the caſe of *Harriſon* againſt *Sharp*, under *Trinity* Term, 10 *Geo.* I.

Michaelmas Term, 11 Anne.

December 10, A. D. 1712.

In the *Exchequer*.

At *Serjeant's Inn Hall, Chancery Lane.*

Smith againſt *Johnſon.*

How tithe for depaſturing unprofitable cattle is to be paid, and at what rate. *Bunb.* 1. pl. 2.

IF a man depaſtures unprofitable cattle in his ground, he ſhall pay tithes in proportion to the number of the cattle, and the value of the land, generally at the rate of two ſhillings in the pound; and the ſame proportion is to be obſerved, if they are travelling cattle, that come and go ſucceſſively. Cattle fed upon meadow ground after it is mowed, ſhall not pay tithe, unleſs by cuſtom.

Cattle fed upon meadow ground, after mowed, pay no tithe.

See the caſe of *Guilbert* againſt *Everſly*, under *Hilary* Term, 6 *Car.* II. *Holbeech* againſt *Whadcocke*, under *Eaſter* Term, 13 *Car.* II.

Trinity

Trinity Term, 12 Anne.

A. D. 1713.

In the *Exchequer.*

Sir *Edward Ward*, Lord Chief Baron.
Sir *Thomas Bury.*
Sir *Robert Price.*
Sir *William Bannister.*

Sir *Simon Harcourt*, Attorney General.
Sir *Peter King*, Recorder of *London.*

Bean, Vicar of *Lydd* in *Kent.*

One shilling in the pound according to the rent, a void *modus.* 3 *Burn's* Eccles. Law, 408.

THE defendant insisted on a custom to pay one shilling in the pound, according to the rent, when their land was let to the full value; after a full debate on both sides, it was decreed to be a void *modus.*

See *Shapter* against *Mitchell*, under Term, 2 *Geo.* 1.

Trinity Term, 12 Anne.

A. D. 1713.

In the *Exchequer*.

John Turner, Clerk, — Plaintiff.

William Smith, *George Wray*, and *Francis Weſton*, — Defendants.

BEFORE, and at the time of the diſſolution of monaſteries, the abbot of *Coverham* in the county of *York*, was ſeiſed in the right of his abbey, of the rectory and pariſh church of *Coverham*, and all the glebe-lands, tithes, oblations, obventions, and other profits, thereunto belonging; and upon the diſſolution, King *Henry* the *Eighth*, by virtue of the ſtatute in that caſe made, became ſeiſed, in right of his crown, of the ſaid abbey and rectory, and all other the rights and poſſeſſions thereof.

The tithe of a rectory, which belonged to a diſſolved abbey, was granted, by the crown, to *A.* the parſon files his bill againſt the occupiers, for an account of tithes, and they ſet up *moduſſes* paid to the grantee of the crown, bill diſmiſſed.
1 *Brown.* 547. pl. 125.
9 *Vin.* Abr. 55. pl. 14.
31 *Hen.* VIII. chap. 13.

Queen *Elizabeth*, by letters patent, under the great ſeal, dated the 19th of *June*, in the fourth year of her reign, granted to *Thomas Allen* and *Thomas Freeman*, and their heirs, the ſaid rectory, and all houſes, buildings, barns, glebe-lands, tithes, oblations, obventions, profits, commodities, and appurtenances whatſoever, thereunto belonging; excepting and reſerving only to her majeſty, her heirs and ſucceſſors, the advowſon of the church of *Coverham*, to hold of her ſaid majeſty, her heirs and ſucceſſors, as of her manor of *Eaſt Greenwich*, in the county of *Kent*, by fealty only, in free ſoccage, and not in *capite*.

Since the diſſolution of this abbey, no tithe, either great or ſmall, ariſing within the pariſh of *Coverham*, were

were ever paid to any incumbent of that pariſh, but were conſtantly accounted for to the crown, or its farmers or leſſees, until the above grant by Queen *Elizabeth*; and afterwards, the tithes were anſwered to the grantees, or thoſe claiming under them, and ſuch owners of the rectory, had uſually paid the miniſter, for the time being, who had officiated, as curate of the pariſh, a ſtipend of eight pounds *per annum* and which by other charitable donations was augmented to twenty pounds *per anuum*.

In the year 1708, the plaintiff was preſented by Queen *Anne* to this rectory and vicarage; and inducted thereto accordingly; but ſoon afterwards, pretending to be intitled to all the tithes of the pariſh he ſummoned the defendants and ſome other of the inhabitants, before two neighbouring juſtices of the peace, for the north riding of the ſaid county of *York*, in order to recover certain *ſpecies* of ſmall tithes, but meeting with no ſucceſs or encouragement in this mode of proſecution, he brought his action at law againſt one *John Geldart*, an inhabitant of the pariſh, for not ſetting out his tithes; and which action being tried at *York* Summer Aſſizes, 1712, the judge, on producing an authentic copy of the above grant, was fully ſatisfied, that the plaintiff had no title to the ſaid tithes, but that the ſame belonged to thoſe claiming under that grant; and thereupon the plaintiff was non-ſuited.

But ſtill perſiſting in his claim, he in *Michaelmas* Term following exhibits his bill in the court of *Exchequer*, againſt the reſpondent and others, for an account, and ſatisfaction of their tithes; to which bill, they, by their anſwer, inſiſted upon ſeveral

moduſſes,

modaſſes, which they had all along paid to the owner of the ſaid rectory; and that what tithes had become due for any other lands, held by them reſpectively, within the ſaid pariſh, had been paid and ſatisfied, or compounded for, to the ſaid owners, or their farmers, to whom the ſame of right belonged.

On the hearing of this cauſe in *Trinity* Term 1714, the court ordered the plaintiff's bill to ſtand diſmiſſed, but without coſts, in reſpect of his being a *pauper*; and, upon appeal, this decree was affirmed; which ſee under *Eaſter* Term, 2 *Geo.* I.

Michaelmas Term, 12 Anne, A. D. 1713.

In *Chancery*.

Simon Baron *Harcourt*, Lord Chancellor.
Sir *John Trevor*, Maſter of the Rolls.
Robert Raymond, Solicitor General.

Roſſe againſt *Harding*.

BILL for a diſcovery of tithes of furze and payment thereof; defendant, by anſwer, inſiſts, that furze ſpent upon the premiſes is not titheable; and alſo that underwood and furze generally are not titheable in that pariſh, *&c.*

Tithe is payable for furze, made into faggots and ſold, but not for furze burnt, or uſed upon the premiſes. 8 *Vin.* Abr. 591. pl. 31.

Plaintiff admits, that no tithes are due for underwood or furze ſpent upon the premiſes, but inſiſts upon tithes of furze made into faggots, and ſold by

the defendant; that underwood or furze ſpent for firing or fencing of the premiſes is not titheable, but underwood or furze ſold is titheable, cites *Moor*, 909.

Smoak money.

In the proofs of the cauſe, there was ſome evidence of one penny a year paid, called ſmoak money, in lieu of tithes or *of* furze, but that not being inſiſted upon, by the anſwer, but a general *non decimando* for underwood and furze; Lord Chancellor *Harcourt* decreed defendant to account for tithes of furze made into faggots and ſold, but not for furze burnt or uſed upon the premiſſes, and defendant to pay coſts.

Term, 2 Geo. I. A. D. 1715.

In the *Exchequer*.

Shapter, Vicar of Saint *Goram*, in *Cornwall*, againſt *Mitchell*.

A *modus* void for uncertainty. 3 *Burn's* Eccleſ. Law, 408.

THE decree in *Bean's* caſe, [which ſee under *Trinity* Term, 12 *Anne*] was now cited, and allowed of for this reaſon, that the *modus* in queſtion expoſes the parſon to be greatly impoſed on, who cannot know what rent is reſerved, nor what fine is taken; and, as to the value of the land, that is ſtill more uncertain.

Eaſter

Eaſter Term, 2 Geo. I.

March 21, A. D. 1715.

In the *Houſe of Lords.*

John Turner, Clerk, --- Appellant.

William Smith, *George Wray*, and *Francis Watſon*, --- } Reſpondents.

FROM the decree pronounced in this cauſe by the court of *Exchequer*, in *Trinity* Term, 12 *Anne*, [which ſee] the plaintiff thought proper to appeal, inſiſting, that he was both rector and vicar of the pariſh of *Coverham*, and as ſuch was intitled, of common right, to all the tithes, both great and ſmall, ariſing within the ſaid pariſh. *1 Br.* Ap. in Parl. 547. pl. 125.

On the other ſide it was contended that the appellant was only a nominal rector of the pariſh, and therefore had no pretence of title to the ſaid tithes; neither had he, or any of his predeceſſors, ever received or enjoyed the ſame; nor did the appellant, in his ſaid appeal, aſſign any error in the ſaid decree.

Accordingly, after hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and that the diſmiſſion of the appellant's bill therein complained of, ſhould be affirmed. Decree affirmed. Lord's Journ. 20. vol. 319.

Trinity

Trinity Term, 2 Geo. I.
July 14, A. D. 1715.

In the *Exchequer*.

Sir *Samuel Dodd*, Lord Chief Baron,
Sir *Thomas Bury*.
Sir *Robert Price*.
Sir *James Montague*

Sir *Edward Northey*, Attorney General.
Nicholas Lechmere, Solicitor General.
Sir *William Thomſon*, Recorder of London.

John Hodgſon, Leſſee of the Governors of Sir *John Hopkins*'s Hoſpital, againſt *Smith*.

Tithes of tares, cut green, and uſed for fother, belong to the impropriator, and not unto the vicar. Lord Chief Baron *Dodd*'s MSS.

PLAINTIFF, as impropriator, demands tithes of corn, grain, hay, fother, &c. in *Welling*, in the county of *Kent*.

The defendant ſowed tares, and cut them green, and uſed them as fother or hay amongſt his cattle, and inſiſted, that the tithe of hay, clover, and ſuch fother graſs, did belong, of right, to the vicar.

On *June* 23, the cauſe was heard, when it was adjourned over to the ſittings, and that in the mean time, the court would conſider, whether the tithes of tares, cut green for fother, did belong unto the plaintiff, or to the vicar.

On *July* 14, the court declared their opinion, that the tithes of defendant's tares, cut green, and uſed for

for fother, did belong unto the plaintiff, who was intitled to the corn tithes, and not unto the vicar, who was intitled to the hay tithe; and accordingly directed an account, which was afterwards taken, the report confirmed, and payment decreed.

It was reſolved by three barons, againſt *Price*, that tares, whether green or ripe, are a great tithe, and belonged to the rector.

Tares, whether green or ripe, are a great tithe, and belong to the rector. *Bunb.* 279. n.

See the caſe of *Hayes* againſt *Dowſe*, under *Hilary* Term, 3 *Geo.* II.

In the *Exchequer*.

May 19, 1715.

Matthew Nicholas, Clerk, vicar of *Shalford*, —— } Plaintiff.

Robert Auſten, Eſquire, and *Elizabeth Auſten*, widow, impropriators of the rectory of *Shalford*, in the county of *Surry*, with the chapelry of *Bramley*, and *Thomas Eames*, *John Wilkins*, and *Edward Elkins*, tenants of the ſaid impropriators, —— } Defendants.

IN 1703, the plaintiff was inducted into the vicarage of *Shalford* and chapelry of *Bramley*, and thereby became entitled to all tithes, duties, and profits, belonging to the ſame.

The tithes of peaſe and beans, ſet, drilled, ſowed, or planted, in rows, in garden-like manner are ſmall tithes, and the uſe of a plough, inſtead of a ſpade, after a new improvement, makes no difference

The defendants *Robert* and *Elizabeth Auſten*, were ſeiſed, in fee, of the impropriation, and the great

2 *Brown.* 31. pl. 5. *Gr.* and *Rud.* of Law and Eq. 338. pl. 8.

tithes of corn, grain, and hay; and the other defendants were their tenants.

The plaintiff, as vicar, was endowed of all the ſmall tithes, and had for a long time received a compoſition of three ſhillings and four-pence an acre, in lieu of the tithes of beans and peaſe, ſet and planted in rows and ranks, that had been hoed and weeded with the hand, where the ground had been turned up with the ſpade, although in the open fields; but where the beans and peaſe had been ſet in rows and ranks, and hoed and weeded with the hand, where the ground had been turned up only with the plough; the tithes of ſuch beans and peaſe had been gathered in kind, by the impropriator, or his farmers.

Until about thirty years before the commencement of this ſuit, the ground in the pariſh was uſually prepared for beans, peaſe and roots, with plough and ſpade together; and, while this method continued, the impropriator never ſet up any right to theſe tithes, ſo that the ſame were enjoyed by the vicar; but the farmers and occupiers of ſome ſmall parcels of land (not conſiderable about twenty years ago) having contrived a tin or iron plate to be annexed to the plough, the uſe of the ſpade was omitted; and thereupon the impropriators or their tenants firſt ſet up a pretence, that thereby the tithes of beans and peaſe became great tithes, and took the ſame accordingly.

The plaintiff ſoon after brought another † bill in the ſame court, againſt the defendants, for the ſmall

† See the caſe of *Nicholas* and *Auſtin*, under *Hilary* Term, 10 *Anne*.

tithes

tithes ariſing from the glebe land, and to confirm the former decree; but pending this ſuit, *Elliot* brought his action of trover againſt the plaintiff, for taking tithes of peaſe which were ſet in rows and ranks, and weeded and hoed upon ground turned up with the plough, and upon the trial of that action (wherein the value of the tithes being agreed on, the only queſtion was, whether the tithes belonged to the impropriator or the vicar) the plaintiff in the action obtained a verdict.

After this verdict, the cauſe againſt the defendants came on to be heard, on the 19th of *May*, 1715; when the barons having admitted their decree againſt *Elliot* to be read (though he was not party to this ſuit, nor were the defendants parties to that) and rejected the evidence, verdict and judgment, in the action of trover; affirmed their former decree, and ordered the defendants to account with the plaintiff for he ſaid ſmall * tithes.

See the caſe of *Nicholas* againſt *Elliot*, under *Hilary* Term, 10 *Anne*, and of *Auſten* againſt *Nicholas*, under *Hilary* Term, 3 *Geo.* I.

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* Becauſe they were matters renovant, and ſubject to encreaſe, &c. *Gr.* and *Rud.* of Law and Eq. 338. pl. 8.

Hilary Term, 2 Geo. I.

January 31, A. D. 1715.

In the *Exchequer.*

Underwood againſt *Gibbon.*

Tithe for depaſturing unprofitable cattle, to be paid by occupier of ground, and not by the agiſtor. *Bunb.* 3. pl. 3.

IT was held by *Bury* and *Mountague*, barons, that the tithes for depaſturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the agiſtor. And by the lord chief baron, *Bury*, and *Price*, againſt *Mountague*, that ſaddle-horſes ſhall pay no tithes, no more than cattle for the plough and pale, or cattle killed for the uſe of a man's own family, in reſpect of the profit, that otherwiſe accrues to the parſon from theſe.

Saddle horſes, cattle for the plough and pale, or killed for family uſe, pay no tithe.

See the caſe of *Pery* againſt *Wright*, and others, under *Eaſter* Term, 13 *Car.* II. *Fiſher* againſt *Leman*, under *Michaelmas* Term, 7 *Geo.* I.

February 26, A. D. 1715.

In the *Exchequer.*

At *Serjeant's Inn, Fleet-ſtreet.*

Keddington againſt *Bridgman.*

Parol compoſition for tithes, good only for one year; but parol leaſe of tithes, void. *Bunb.* 2. pl. 2.

IT was held by *Bury* and *Price*, barons, that a compoſition, by way of retainer by parol can be good only for one year, being by way of contract; but a leaſe of tithes even for one year, by way of parol, would be void. *Mountague*, baron, ſeemed to be of opinion, that an agreement between the parſon and his pariſhioners for years, by parol, would be good, though not for life, being only an agreement, that he will not ſue the pariſhioners for ſo many years for tithes.

Trinity

Trinity Term, 3 Geo. I.

June 28, A. D. 1716.

In the *Exchequer.*

At *Serjeant's-Inn Hall, Chancery-Lane.*

Ayde againſt *Flower.*

A Vicar preferred his bill for tithe herbage and ſmall tithes; it was objected, for the defendant, that tithe for the depaſturing barren and unprofitable cattle may be due of common right, but not to the vicar; therefore it lies upon him to ſhew, that he was endowed of it, or at leaſt, that it has been uſually received by the vicar, which would be an evidence of an endowment. As to the tithe of meadow ground, that hath been mowed, of which the vicar hath had the tithe, and after it is depaſtured by unprofitable cattle, there is no tithe due for that.

Vicar need not ſet forth how he is intitled to tithe herbage, and to ſmall tithes. *Bunb.* 7. pl. 7.

No tithe due for meadow ground mowed, which hath paid tithe, and after depaſtured unprofitable cattle.

The copy of the *valor beneficiorum* (which was taken by commiſſion in the reign of *Hen.* VIII.) was produced, and it did not appear, that this demand of the plaintiff was mentioned there among the other ſmall tithes. Lord Chief Baron *Bury* and *Mountague* againſt *Price*, that the bill ſhould be diſmiſſed.

It was objected to an evidence, that he had the inheritance of lands within the pariſh (though he was not an inhabitant, and the lands were in the hands of a tenant) and therefore his evidence would be to diſcharge the inheritance of the lands of the tithes; which would be ſuch an advantage to him, as to render him not indifferent; but notwithſtand-

An objection to the credit of a witneſs, will not prevent his depoſition being read.

ing this objection, which goes only to the credit of a witneſs, his depoſition was admitted to be read.

See the final determination of the court, in this caſe, under *Trinity* Term, 4 *Geo.* I.

See alſo the caſe of Alderman *Langham* againſt *Baker*, and twenty-two others, under *Michaelmas* Term, 10 *Car.* II. and of *Stone* againſt *Ludlowe* and others, under *Hilary* Term, 14 & 15 *Car.* II.

July 5, 1716.

In the *Exchequer*.

Sir *Thomas Bury*, Lord Chief Baron.
Sir *Robert Price*.
Sir *James Montague*.

only.

Sir *Edward Northey*, Attorney General.
John Forteſcue Aland, Solicitor General.
Sir *William Thomſon*, Recorder of *London*.

Perrot and *Markwick*.

Penny for ancient gardens and orchards, adjudged good. *Bunb.* 79.

A Penny for ancient gardens and orchards, adjudged a good *modus*.

Hilary Term, 3 Geo. I.
February 20, A. D. 1716.

In the *Exchequer*.

Benſon againſt *Watkins*.

BILL by an impropriate rector for tithes; defendant inſiſts upon ſeveral *moduſes*, *viz.* five ſhillings an acre for wheat and rye; four ſhillings an acre for ſummer corn; three ſhillings an acre for meadow, *&c.* The court diſallowed theſe *moduſes*, and decreed the defendant to account, they being too rank, and to near the value of the land; eſpecially when theſe *moduſes* were ſuppoſed to commence, when the land was at a much leſs value, and money at much greater.

Modus too near the value of the land diſallowed; and defendant decreed to account for tithes in kind. *Bunb.* 10. pl. 12.

It was ſaid in this caſe, that the only difference between a *modus* and compoſition, is, that the firſt is time out of mind, and the laſt only a late agreement.

Difference between a *modus* and a compoſition.

All the garden ground in *England*, ſhall pay tithes for different crops; *turnips*, when they are pulled, ought to pay tithe, though never ſo often ſowed, and though upon the ſame land.

Tithe for gardens. Turnips.

Tithes of *after-moath* ſhall be paid, but not tithes of *after-paſture*, unleſs by cuſtom; but *quære* of *theſe laſt points*.

After-moath. After-paſture.

See the caſe of *Harriſon* againſt *Sharpe* under *Trinity* Term, 10 *Geo.* I. *Smith* againſt *Roocliff*, under *Hilary* Term, 3 *Geo.* I.

Hilary Term, 4 Geo. I.

Jan. 24, A. D. 1717.

In the *Houſe* of *Lords*.

Robert Auſten, Eſquire, and *Elizabeth Auſten*, widow, impropriators of the rectory of *Shalford*, in the county of *Surry*, with the chapelry of *Bramley*; and *Thomas Eames*, *John Wilkins*, and *Edward Elkins*, tenants of the ſaid impropriators, — } Appellants.

Matthew Nicholas, clerk, vicar of *Shalford*, — } Reſpondent.

2 *Br.* Ap. in Parl. 31. pl. 5. *Bunb.* 19. pl. 24. by the name of *Nicholas* againſt *Elliot*.
9 *Vin.* Abr. 22. pl. 3. S. C. but on a point of evidence, in
12 *Vin.* Abr. 94. pl. 20. Id. 120. pl. 2.
2 *Br.* Ap. in Parl. 32. *Gr.* and *Rud.* of Law and Eq. 338. pl. 8.

FROM the original decree in the *Exchequer*, [which ſee under *Trinity* Term, 2 *Geo.* I.] the defendants appealed, inſiſting, that there were in this caſe two contradictory determinations of the ſame queſtion; the one in a court of equity, the other at common law; that the determination at common law ought to ſtand; for that every man's freehold and inheritance ought to be tried and determined at common law; or at leaſt, that no decree ought to have been made without a ſecond trial: that the court of *Exchequer*, by allowing the former decree to be read, as an authority in the like caſe, though not under the denomination of evidence, did in effect found a decree againſt the appellants, on a proceeding which ought not by law any way to affect their right: that by this means all the tithes of wheat, barley, *&c.* might be turned into ſmall tithes; for as much as wheat and barley were in many places ſowed in furrows after the

the plough, and often times hoed and weeded with the hand: that the vicarage was never endowed with ſmall tithes ariſing upon the glebe lands, nor had the vicar ever any poſſeſſion of ſuch tithes; that this was a new caſe, and would, in conſequence, affect all the impropriators in *England*; for that this ſort of huſbandry of planting peaſe in rows and ranks after the plough, and weeding and hoeing the ſame, was found to be a great improvement of the crop: that the vicar having a right to peaſe planted in gardens, where the ſpade only was uſed to turn the ground (the ſame ſort of huſbandry being uſed in the open fields;) and there being an old cuſtom in the pariſh to pay three ſhillings and fourpence an acre for ground turned with the ſpade, and planted with any ſort of roots, the vicar had accordingly received ſuch compoſition of three ſhillings and fourpence as well for peaſe as roots; and it did not appear, by any proof, that the vicar ever collected tithes in kind of peaſe, planted after the ſpade; but that, on the contrary, only three ſhillings and fourpence an acre had all along been paid him, for all trenched ground planted, whether with peas or roots.

On the other ſide it was contended, that though vicars ſometimes (for eaſe of themſelves and the pariſhioners) agreed to take a compoſition; yet it did not deſtroy the right they had to the tithes, either in kind, or according to a *modus*; but the old right continued, to take the tithes according to the antient method of payment, when the time for which the compoſition was made, was determined: that the vicar had, for time immemorial, received the tithes of beans and peaſe planted and managed in garden-like manner, as well after the plough as after the ſpade: that the court of *Exchequer* only read the decree againſt

Elliot

Elliot. by way of precedent, and regard it as ſuch, as well as other caſes cited out of the law books: that it was impoſſible the tithes of wheat, barley, &c. ſhould ever be turned into ſmall tithes, by means of this decree; for without a preſcription, no claim could be made of ſuch tithes by a vicar, let the ground be prepared or turned, or the ſeed ſown or ſet, in what manner ſoever: that where the vicar did ſo preſcribe, the diſuſing a ſingle inſtrument, and ſtill continuing the ſame crops, and manner of huſbandry, could not deprive him of that preſcription; beſides the reſpondent claimed tithes of no other corn or grain ſet in rows or ranks, or otherwiſe ſown in fields, but only of peaſe and beans; which plantation, took its riſe from the garden-culture of ſuch crops: that upon hearing the cauſe, the appellants could not make it appear that the lands for which they inſiſted on an exemption of all ſmall tithes, were glebe lands; or, that as ſuch, or by any other means, they were legally diſcharged of tithes to the vicar; and therefore, the court decreed them to pay tithes of ſuch lands, that this was no new caſe, there being precedents of the like nature in the court of *Exchequer*: that without a preſcription, the vicar could not claim; and with it, he was intitled to the improvement, but, if omitting an inſtrument in huſbandry, could defeat the preſcription, then the right of all preſcriptions was at an end.

Decree affirmed, Lords Journ. 20 vol. 583. *Bunb.* 20.

Accordingly, after hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed; and the decree therein complained of affirmed.

See the caſes of *Nicholas* againſt *Elliot*, under *Hilary* Term, 10 *Anne*. *Nicholas* againſt *Auſten*, under *Trinity* Term, 3 *Geo.* I.

Feb. 18, 1717.

In the *Exchequer.*

Bate againſt *Spracking.*

IT was decreed by the court, that no tithe ſhould be paid of hop poles: that tithe milk ought to be every tenth meal; and that in all caſes where you do not make out ſome cuſtom, you muſt pay according to the *canon.*

Tithes of hop-poles and milk. *Bunb.* 30, pl. 26.

See the caſe of *Dodd* againſt *Ingleton*, under *Eaſter* Term, 13 *Car.* II. and *Dodſon* againſt *Oliver*, under *Eaſter* Term, 8 *Geo.* I.

Feb. 19, A. D. 1717.

In the *Exchequer.*

Anon.

IT was ſaid by baron *Price*, it is time enough to give notice to determine an agreement for a compoſition, before the reaping of corn, and picking hops, but not after.

Compoſition may be determined before reaping the corn, or picking hops, but not after. *Bunb.* 15.

See the caſes of *Breamer* againſt *Thornton*, and others, under *Michaelmas* Term, 13 *Car.* II. and of *Reynal* againſt *Rogers*, under *Trinity* Term, *Geo.* I. and of *Hewitt* againſt *Adams*, under *Eaſter* Term, 22 *Geo.* III.

In

In the *Exchequer.*

Smith againſt *Roocliff.*

What *modus* is too rank. *Bunb.* 20. pl. 25.

THE barons were of opinion, that a *modus* of one ſhilling in the pound, for paſture, according to the value of the land, was a void *modus*; as is alſo a *modus* of one ſhilling in the pound, according to the value of the rent.

See the caſes of *Benſon* againſt *Watkins*, under *Hilary* Term, 3 *Geo.* I. *Harriſon* againſt *Sharp*, under *Trinity* Term, 11 *Geo.* I.

In the *Exchequer.*

Anon.

Abridgment of demand. *Bunb.* 22. pl. 29.

IF there be a general demand of tithes, and a general replication put in; if the plaintiff upon the commiſſion gives notice, that he will proceed only as to ſuch and ſuch particular matters, it is as well as if the demand had been abridged in the application, but *quære.*

Trinity

Trinity Term, 4 Geo. I.
July 17, A. D. 1717.

In the *Exchequer.*

Sir *Thomas Bury*, Lord Chief Baron.
Sir *Robert Price.*
Sir *James Mountague.*
Sir *John Forteſcue Aland.*

Sir *Edward Northey*, Attorney General.
Sir *William Thomſon*, Solicitor General, and Recorder of *London.*

Reynal againſt *Rogers.*

Compoſition cannot be determined, as to part, and continued, as to the reſt. *Bunb.* 15. pl. 19.

REYNAL preferred his bill againſt *Rogers* for tithe of hops; the defendant inſiſts upon a compoſition; plaintiff ſays he gave notice to determine the compoſition; but being the compoſition appeared to be for all ſmall tithes, and the notice to determine only as to hops; the bill was diſmiſſed, becauſe you cannot determine a compoſition, as to part, and let it continue as to the reſt.

See the caſes of *Breamer* againſt *Thornton*, and others, under *Michaelmas* Term, 13 *Car.* II. and *Anon.* under *Hilary* Term, 4 *Geo.* I.

Trinity

Trinity 4 Geo. I.
July 17, A. D. 1717.

In the *Exchequer*,
At *Serjeant's-Inn-Hall, Chancery-Lane.*

Ayde againſt *Flower.*

Defendant decreed to account with coſts. *Bunb.* 7. pl. 7.

MR. *Forteſcue Aland* being made a baron, this cauſe was re-heard, and *then* the plaintiff produced the endowment of the vicar by the dean and chapter of *York*, whereby the vicar is endowed *of all, and all manner of ſmall tithes whatſoever*; and as to the *valor beneficiorum*, it was ſaid, that there were other tithes not mentioned in that book, which the defendant himſelf admits belonged to the vicar; and by the opinion of the four barons, the defendant was decreed to account with coſts.

For the former part of this caſe, ſee under *Trinity* Term, 3 *Geo.* I.

Hilary

Trinity Term, 5 Geo. I.
A. D. 1718.

In the *Exchequer*.

Sir *Thomas Bury*, Lord Chief Baron.
Sir *Robert Price*.
Sir *James Mountague*.
Sir *Francis Page*.

Nicholas Letchmere, Attorney General.
Sir *William Thomſon*, Solicitor General, and Recorder of *London*.

Benning againſt *Douce*.

How an exemption from tithes ought to be laid. *Bunb.* 26. pl. 39.

THIS was a bill for tithes; the defendant inſiſted, that the lands where, *&c.* were part of the homeſtall, which is part of the biſhop of *London's* palace; and therefore exempt from payment of tithes, but did not lay it perſonally in the biſhop; and this was allowed by Lord Chief Baron *Bury*, and Baron *Price* againſt *Page*, to be well enough, becauſe this exemption goes along with the lands; although it would have been better laid by way of formal preſcription as at law; that the biſhop for himſelf, and his tenants, have time out mind, *&c.* And as to lands belonging to a monaſtery, they muſt ſet forth how the preſcription is; but where the land itſelf is exempt, it is diſcharged, in whatever hands it comes; and by the opinion of two barons againſt one (*in the abſence of Mountague*) the bill was diſmiſſed.

Muſt ſet forth in lands belonging to monaſtery, how the preſcription is. Land exempt is ſo in whatever hands it comes.

July

July 8, A. D. 1718.

Bailey againſt *Peaſely*.

In what caſe value of tithes is to be aſcertained by the plaintiff's oath. *Bunb.* 26. pl. 38.

BILL for tithes, defendant ſtood out until a ſequeſtration, and the bill was taken *pro confeſſo*; it was moved for the defendant, that upon paying the coſts, the value of the tithes might be aſcertained, and reduced either by the taxation of the maſter, or by the oath of the plaintiff himſelf; but the court would make no other order, than that the plaintiff ſhould ſhew cauſe, why he ſhould not conſent to give his oath to the value.

See the caſe of *Croſman* and *Goodrick*, under *Hilary* Term, 2 & 3 *Jac.* II.

Michaelmas Term, 5 Geo. I. A. D. 1718.

In the *Exchequer*.

Anon.

Tender muſt be before, as well as by anſwer, in order to ſave the defendant his coſts. *Bunb.* 28. pl. 42.

IF to a bill for tithes, the defendant does not ſhew a tender before, or make it in the anſwer, the plaintiff is intitled to an account, although the value be never ſo ſmall: if there hath been a tender before, and a tender is alſo made by the anſwer, the defendant ſaves his coſts: if the tender is only by the anſwer, he muſt account with coſts; but *quære*.

See the caſe of the biſhop of *Exeter* againſt *Trenchard*, under *Trinity* Term, 6 *Geo.* I.

Hilary Term, 5 Geo. I.

Feb. 20. A. D. 1718.

In the *Exchequer.*

At *Serjeant's Inn Hall, Chancery-lane.*

Hanking againſt *Gay*, and others.

How an exemption of land from tithes, as belonging to one of the greater monaſteries, ſhould be laid in the anſwer. *Bunb.* 37. pl. 58.

BILL for tithes; defendants in their anſwers inſiſted, that the lands where, *&c.* were formerly belonging to the abbot of *Crowland*, which was one of the greater monaſteries, diſſolved by ſtat. 31 *Hen.* VIII. *chap.* 6. and therefore exempt; but do not ſay, that they were diſcharged, when parcel of the abbey lands, though not one of the orders which was diſcharged.

And the defendants inſiſted, that conſtant non-payment, was a ſufficient evidence of an exemption; eſpecially being coupled with being parcel of one of the greater monaſteries.

The court unanimouſly decreed for the plaintiff in the preſent caſe; for that the proof was not full as to non-payment; and alſo, though the defendant ſay, that lands were in the abbot's hands; yet he does not ſay, they were diſcharged in his hands; and the ſtatute of 31 *Hen.* VIII. chap. 6 extends only to *ſuch.*

See the caſe of *Page* under *Eaſter* Term, 15 *Car.* II. *Collard* againſt *Newton*, under *Hilary* Term, 32 *Car.* II. *Ayde* againſt *Flower*, under *Trinity* Term, 3 *Geo.* I. *Hicks* againſt *Golding*, under *Hilary* Term, 7 *Geo.* I. *Clark* againſt *Daſhwood*, under *Trinity* Term, 7 *Geo.* I.

Eaſter Term, 6 Geo. I.
A. D. 1719.

In the *Exchequer*.

Earl of *Scarborough* againſt *Hunter*, and others.

How the tithe of fiſh ought to be laid. *Bunb.* 43. pl. 69.

A Bill was preferred by the plaintiff for the tithe of fiſh due by cuſtom, which cuſtom was *laid* for all fiſh taken at ſea, and brought to land, and ſold within the pariſh of *Hart*, of which the Earl was impropriate rector; ſecondly, for all fiſh ſold at ſea, and the veſſel came back to the pariſh; thirdly, for fiſh taken by the inhabitants, and ſold at another port; although the plaintiff did not prove his cuſtom, as laid in the bill, yet *by three barons againſt the chief baron*, an iſſue was directed to try, whether there was ſuch cuſtom as laid in the bill, or whether any, and what cuſtom; though it was ſaid, there never was any inſtance, where either the plaintiff or defendant inſiſted upon a *modus*, or cuſtom, and did not prove it, that ever it went to a trial at law, it being eſſential to a *modus*, or cuſtom, that it be certain.

Iſſue directed to try a cuſtom, though no proof of it made.

It was alſo objected, that the cuſtom was illegal, as it was laid; for if it is a perſonal tithe, as inſiſted upon, (and as the court ſeemed to think) then a double tithe may be payable not only in another port, where the fiſh is ſold, but alſo where the fiſherman inhabits; to which *three barons againſt the Lord Chief Baron*, ſaid it was a good cuſtom; for one tithe may be paid by cuſtom, and one of common right.

Double tithe may be payable, one by cuſtom, another of common right.

See the caſes of *Gwavas* againſt *Kelynac*, under *Trinity* Term, 1 *Geo.* II. and under *Michaelmas* Term, 2 *Geo.* II. and *Ex parte Gwavas*, under *Eaſter* Term, 2 *Geo.* II.

In

In the *Exchequer*.

Watſon againſt *Lindſel*.

THIS *modus* was inſiſted upon by the defendant, for tithe milk, that he paid the tenth meal from the firſt day of *May* incluſive, twice every tenth day at the church-porch, until the firſt of *Auguſt* incluſive; but this cauſe going off upon another point, no opinion was given as to the validity of the *modus*.

Modus for tithe milk. *Bunb.* 40. pl. 63.

It was ſaid in this cauſe, that it is a good objection to a witneſs, that he is an inhabitant of the pariſh, where the *modus* is inſiſted upon; and if he is not in the occupation of any lands titheable, it lies upon the other ſide to ſhew it.

Witneſs objected to, becauſe an inhabitant of pariſh, where *modus* inſiſted on. It lies on the other ſide to ſhew, party enjoys no titheable lands.

See the caſe of *Dodd* againſt *Ingleton*, under *Eaſter* and *Michaelmas* Terms, 31 *Car.* II.

Trinity Term, 6 Geo. I.

A. D. 1719.

In the *Exchequer*.

The Biſhop of *Exeter* againſt *Trenchard* and others.

IN a bill for tithes, the defendant, as to ſome of them, inſiſts upon a *modus*, but admitted others, which he had not paid, and having omitted to make a ten-

Tender of payment for tithes, admitted after answer. *Bunb.* 47. pl. 78.

a tender of them, by his anſwer, he upon motion obtained an order, that he might be at liberty to pay ſo much money in lieu and ſatisfaction of all his tithes, not covered by the *modus*, together with the plaintiff's coſts to that time, and the plaintiff to proceed at the peril of coſts; but the *reporter* believes this was by conſent; and

See an *Anon.* caſe, under *Michaelmas* Term, 5 *Geo.* I.

Hilary Term, 6 Geo. I.

A. D. 1719.

In the *Exchequer.*

Roe and others againſt the Biſhop of *Exeter.*

Moduſes allowed. *Bunb.* 57. pl. 97.

IN a bill to eſtabliſh *moduſes*, theſe were inſiſted upon, and allowed.

Milch cow and calf.

1. For every cow, having a calf, for the tithe of the milk and the calf ſeventeen pence.

Milch cow without calf.

2. For every milch cow milked, without a calf, eleven pence for the tithe of the milk.

Heifer and calf.

3. For every heifer, the firſt year ſhe has a calf, thirteen pence for the milk and calf.

When payable.

The above payable at *Michaelmas.*

Cyder.

4. For every hogſhead of cyder, made of apples grown in the pariſh, eight pence.

Hoard apples.

5. For hoard apples, one penny.

VI. For

6. For fire-wood ſpent on the farm, an hearth penny. Fire-wood.

7. For fruit, herbs, roots, and other garden ſtuff, a garden penny. Fruit, herbs, roots, garden ſtuff, and garden.

8. For a colt a penny. Colt.

The above payable at *Eaſter*. When payable.

See the caſe of *Phillips* againſt *Symes*, and of *Symes* againſt *Phillips*, under *Trinity* Term, 11 *Geo.* I.

Eaſter Term, 7 Geo. I.
May 14, A. D. 1720.

In the *Exchequer*.

Sir *Thomas Bury*, Lord Chief Baron.
Sir *Robert Price*.
Sir *James Mountague*.
Sir *Francis Page*.

Sir *Robert Raymond*, Attorney-General.
Sir *Philip Yorke*, Solicitor General.
Sir *William Thomſon*, Recorder of *London*.

Gumley againſt *Fontleroy*.

BILL by a vicar for tithes; the defendant pleads, that the plaintiff employed a perſon to collect the tithes and that he the defendant paid the collector five

Although a *modus* be pleaded, yet quantities and values muſt be ſet forth. *Bunb.* 60. pl. 103.

five pounds, and does not ſet forth quantities and values; ſo the plea was over-ruled with coſts; for this court never admits a plea, even of a *modus*, to cover the diſcovery of quantities and values, becauſe the defendant may die before they go to examination; and then tithes lying only in the perſonal knowledge of the party, there would be no way of coming to the knowledge of the particulars; and the caſe of *Randal* againſt *Head* and others, which ſee under *Eaſter* Term, 13 *Car.* II. was denied, and it was ſaid, it had often been ſo.

See the caſe of *Baker* againſt *Planner*, under *Eaſter* Term, 9 *Geo.* 1.

May 23, A. D. 1720.

In the *Exchequer.*

Jordan, againſt *Colley* and others.

Pariſh cannot preſcribe in *non decimando* for tithe wood; not certainly determined, that tithe wood is due *of common right* *Bunb.* 61. pl. 103.

BILL by a rector for tithe wood, in the pariſh of *Little Wenlocke* in the county of *Salop*, as it had been time out of mind paid in that pariſh, againſt the defendants, as vendees of Sir *William Forreſter*; the defendants in their anſwer ſay, that no tithe had been paid for this coppice wood, called *Holbrook Coppice*, when felled before; and that they never heard, that any tithe or *modus* had been paid for wood in that pariſh.

It was inſiſted upon, for the defendants, that tithe wood was not due *of common right*; and that therefore the proof lay upon the plaintiff; and that it was only founded upon a canon in biſhop *Stratford*'s

time, in the year 17 *Edw.* III. and therefore, the defendant need not alledge any preſcription or cuſtom by way of exemption; but it was anſwered for the plaintiff, that occupiers muſt always ſet forth an exemption.

And *by the court*; the defendant ought to have ſhewn ſome exemption; and there is no inſtance, that a pariſh can preſcribe in *non decimando* for tithe wood; wilds and hundreds are upon another conſideration.

But *note* (ſays the reporter himſelf) though the defendants were decreed to account, I do not find, that it is yet certainly determined, that tithe wood is due of *common right*.

Trinity Term. 7 Geo. I.

July 13, A. D. 1720.

In the *Exchequer*.

Clark againſt *Daſhwood*.

Conſtant non-payment evidence of exemption in the caſe of a lay impropriator. *Bunb.* 66. pl. 111.

BILL for the tithes of the rectory of *Carſington*, in the county of *Oxford*, particularly of coppice wood, called *Burleigh-wood*; and the plaintiff derives his tithe from the leſſee of the dean and chapter of *Chriſtchurch*: the defendant inſiſts, that no tithe of this wood was ever paid but once (being terrified) for that it was exempt as part of the poſſeſſions of *Eynſham* abby, which was one of the greater abbies, and conſequently capable of an exemption by ſtat. 31 *Hen.* VIII. chap. 6.; and defendant's counſel did inſiſt, that conſtant non-payment was an evi-

31 *Hen.* VIII. cha. 6.

dence of exemption in the caſe of a lay impropriator; but *note*, the proof was only *belief* and *hearſay*, and the defendant was decreed to account.

See the caſe of *Hanking* againſt *Gay*, under *Hilary* Term, 5 *Geo.* I. *Hicks* againſt *Golding*, *Hilary* Term, 7 *Geo.* I.

Michaelmas Term, 7 Geo. I.

Nov. 10, A. D. 1720.

In the *Exchequer.*

Bliſs againſt *Chandler.*

Setting forth the tithe of hops by the tenth pole, unpicked, illegal. *Burn's* Eccleſ. Law, 450. *Bunb.* 20. n. 3.

THE defendant *Chandler*, a planter of hops at *Maidſtone* in *Kent*, having ſet forth the tithe of his hops by the tenth pole unpicked, the plaintiff *Bliſs* the impropriator brought this matter before the court of *Exchequer*; where after long debate of counſel on both ſides, and reading three former decrees, the court again declared this method of ſetting forth to be illegal.

See the caſe of *Chitty* againſt *Reeves*, under *Trinity* Term, 3 *Jac.* II.

Michaelmas

November 17. A. D. 1720.

In the *Exchequer*.

Sir *Thomas Bury*, Lord Chief Baron.
Sir *Robert Price*.
Sir *James Mountague*.
Sir *Francis Page*.

Sir *Robert Raymond*, Attorney General.
Sir *Philip Yorke*, Solicitor General.
Sir *William Thomſon*, Recorder of *London*.

Fiſher againſt *Leman*.

IT was agreed, ſettled, and reſolved by the whole court of *Exchequer*, that where unprofitable cattle were depaſtured occaſionally in another man's ground, that the tithe for depaſturing ſuch cattle, ought to be paid by the owner of the land, and the occupier of the ground, and not by the agiſtor, or the owner of the cattle; but that in the caſe of a common, the bill muſt be againſt the owner of the cattle (if known) becauſe the owner of the ſoil has no profit by it; and Baron *Page* ſaid, that as to what had been ſaid, that the demand might be either againſt the occupier or agiſtor, that could not be; for that the ſame duty could not ariſe in two different perſons at the ſame time.

Tithes for depaſturing unprofitable cattle, payable by the occupier of the ground, and not by the agiſtor. 9 *Vin.* Abr. 38. pl. 7. *Bunb.* 3. n.

The bill, in caſe of a common, muſt be againſt the owner of the cattle. *Bunb.* 3. n.

Page J. ſaid, That the ſame duty could not ariſe in two different perſons at the ſame time. 9 *Vin.* Abr. 38. pl. 7.

See the caſe of *Perry* againſt *Wright*, under *Eaſter* Term, 13 *Car.* II. *Underwood* againſt *Gibbon*, under *Hilary* Term, 2 *Geo.* I.

Hilary

Hilary Term, 7 Geo. I.

February 6, A. D. 1720.

In the *Exchequer.*

Hicks againſt *Golding.*

General exemption bad. *Bunb* 66. pl. 111. marg.

A General exemption held bad.

See the caſes of *Hanking* againſt *Gay*, under *Hilary* Term, 4 *Geo.* I. *Clark* againſt *Daſhwood*, under *Trinity* Term, 4 *Geo.* I.

February 24, A. D. 1720.

In the *Exchequer.*

Glanvil againſt *Trelawney.*

Impropriator muſt be made a party to a bill brought againſt his leſſee, to eſtabliſh a *modus*. *Bunb.* 70. pl. 119.

WHERE a man prefers a bill to eſtabliſh a *modus* againſt the leſſee of the impropriator, he muſt make the owner of the impropriation a party; for this court will not bind the inheritance of any perſon, unleſs he is before the court.

Eaſter

Eaſter Term, 8 Geo. I.

April 27, A. D. 1721.

In the *Exchequer.*

Pye againſt *Rea.*

BILL by a vicar for tithes; the defendant admitted in his anſwer, that the plaintiff was intitled to all ſorts of tithes, but inſiſted upon a ſpecial exemption; upon this admiſſion the plaintiff was not obliged to ſhew any ſpecial tithe, either by endowment or preſcription, which otherwiſe he ought to have done.

In caſe defendant admits plaintiff's title to tithes, he need not ſhew any. *Bu b.* 72. pl. 121.

See the caſes of *Boulton* againſt *Honey*, under *Michaelmas* Term, 10 *Car.* II. *Stone* againſt *Ludlowe*, under *Hilary* Term, 14 & 15 *Car.* II.

May 11, A. D. 1721.

In the *Exchequer.*

Dodſon againſt *Oliver.*

THE ſingle queſtion adjourned until this day, for the ſolemn judgment of the court was; whether tithe of an ancient corn-mill, that had never paid tithes, was payable and due of common right. Baron *Price* and Baron *Mountague* were of opinion, that an ancient mill ought to pay the tenth toll diſh, which being a tenth part of the thing itſelf, was a predial tithe, and due of common right; but Lord Chief Baron *Bury*, and *Page*, that it is a perſonal tithe, and not due of common right, and not having been paid, is now exempt by ſtat. 2 & 3 *Edw.* VI. chap. 13. So the court being divided, the

Court being divided, no decree as to the tithe of an ancient mill. *Bunb.* 73. pl. 123.

Predial tithe.

2 and 3 *Edw.* VI. chap. 13.

the plaintiff had no decree as to this matter of the mill.

See the caſe of *Anſel* againſt *Adman*, under *Trinity* Term, 6 *Wil.* III.

Tithe milk ought not to be carried to church porch, or to parſon's houſe, but he ought to fetch it.

And it was determined by the whole court of *Exchequer*, in the cauſe of *Dodſon* and *Oliver*, at a former day, that the milk ought not to be carried either to the church porch, or to the parſon's houſe, and that it ought to be fetched by the parſon.

See the caſes of *Dod* againſt *Ingleton*, under *Eaſter* Term, 13 *Car.* II. *Bate* againſt *Spracking*, under *Hilary* Term, 4 *Geo.* I.

A. D. 1721.

In the *Exchequer*.

Anon.

Manner of tithing milk of common right, where there is no particular cuſtom to go by. *Bunb.* 73. pl. 123.

IF there be any cuſtom in a pariſh for the manner of tithing milk, as to carry it to the church porch, or parſonage-houſe, *that* muſt be obſerved by the pariſhioner; but if there be no particular cuſtom or uſage, the pariſhioner is obliged *de jure* to pay every tenth meal; to milk the cows, at the uſual place of milking, into his own pails; and the parſon is obliged to fetch it away from the milking-place in his own pails, in a reaſonable time; and if he does not fetch it before the next milking time, the pariſhioner may juſtify pouring the milk upon the ground, becauſe he *then* has occaſion for his own pail.

See the caſe of *Dod* againſt *Ingleton*, under *Eaſter* Term, 13 *Car.* II. *Bate* againſt *Spracking*, under *Hilary* Term, 4 *Geo.* I. / *Dodſon* againſt *Oliver*, under this Term.

Trinity Term, 8 Geo. I.
A. D. 1721.

In the *Exchequer.*

Turton againſt *Clayton.*

BILL for tithes by the rector of *Standiſh*, in the county of *Lancaſter*; the defendant inſiſted on a *modus* of three-pence for houſe, hay, hen, and yard, *viz.* for hay a penny, for an houſe a penny, for hen, an halfpenny, and for yard, an halfpenny.

Diſtributive *moduſes* are not good. *Bunb.* 80. pl. 133.

By the opinion of the whole court; this is a void *modus*, taking it either diſtributively or entirely; for, as to the hay a penny, is unreaſonable; for if a man has ſixty acres of hay, he pays only a penny, and if he lets them to ſixty ſeveral perſons, they ſhall pay a penny a-piece; defendant decreed to accompt.

June 15, A. D. 1721.

In the *Exchequer.*

Franklyn and others, Pariſhioners,

againſt

The Maſter and Brethren of Saint-*Croſs*, as Impropriators; *Bennet*, their Leſſee; and *Jenkins* the Vicar of the pariſh of *Faram*, in the county of *Southampton.*

THIS bill was brought by the plaintiffs, the pariſhioners, againſt the defendants, to eſtabliſh certain *moduſes* in the pariſh; the firſt *modus* inſiſted

Twelve pence for a milch cow, adjudged void, being too rank; but ſixpence for every calf killed and ſold, held to be good. *Bunb.* 78. pl. 130. and n.

ſiſted upon, was twelve-pence for a milch cow; the ſecond was ſixpence for every calf killed and ſold; the former of them was adjudged to be a void *modus*, being too rank; the ſame being above half the value of the milk at the time the *modus* was ſuppoſed to commence.

Hops a ſmall tithe.

The vicar being endowed of ſmall tithes, and hay, it was decreed, that he was thereby intitled to hops being a ſmall tithe, though of growth ſince the endowment; and alſo to clover, *ſainfoin*, and rye-graſs, which are *ſpecies* of hay, that is the *genus*.

Clover, ſainfoin, and rye-graſs, titheable.

No tithe for after-paſture, or cattle fed on ſtubble.

No tithe due for after-paſture, or cattle fed on ſtubble.

Although by the endowment the vicar was to find the ſacrament wine, yet the court were of opinion, it ſhould be found by the pariſhioners, according to the direction of the canon.

Note; Where *altaragium* is mentioned in old endowments, and ſupported by uſage, it will extend to ſmall tithes, but not elſe.

Michaelmas

Michaelmas Term, 8 Geo. I.

November 6, A. D. 1721.

In the *Exchequer.*

Fox againſt *Rutty.*

BILL by the vicar of *Melſham* againſt a pariſhioner for tithes; an iſſue was directed to try, whether a parcel of lands, called *Iſlay*, uſually paid tithes to the vicar of *Melſham*, or to the rector of *Whaddon* (who was not before the court); the jury find, that it had paid tithe to neither; and upon the *poſtea* returned, it was inſiſted, for the defendant, that by this finding the court could make no decree, for that they had no ſatisfaction by it.

Court decree for vicar on return of *poſtea*, upon iſſue directed to try, whether tithes were uſually paid to him, or to the rector, though the jury do not find, that they were paid to either. *Bunb.* 87. pl. 141.

But *by the court*, the vicar is endowed *of all ſmall tithes within the pariſh*, &c. and the defendant's defence, both in law and equity, is falſified; and though tithes have never been paid, yet the vicar has the ſame right to all within his endowment, even without uſage (unleſs an uſage to the contrary is ſhewn) as the rector has of common right; in which laſt caſe a man cannot inſiſt, that tithes have never been paid, which is a *non decimando*; and decreed for the vicar accordingly.

Vicar has ſame right to all tithes in his endowment as the rector has of common right.

Non decimando what?

See the caſe of *Twiſſe* and *Brazen-noſe* college, under *Trinity* Term, 15 *Car.* II.

November

November 20, A. D. 1721.

Baker, and others, againſt *Sweet*.

Tithe-wool of lambs, though they had paid before, ſhall be paid; and alſo, for the agiſtment of yearlings. *Bunb.* 90. pl. 146.

IN this caſe it *ſeemed* to be admitted, that wool of lambs ſhall pay tithes; though the lambs had paid tithes two months before; and that there ought to be paid tithe for the agiſtment of yearlings, being a new encreaſe.

Heaton, Impropriator of *Garnthorp*, in *Lincolnſhire*, againſt *Regal*.

Firſt of *Auguſt*, and not firſt of *May*, proper time to ſet forth tithe lambs. 3 *Burn's* Eccleſ. Law. 456.

THE defendant inſiſted on a cuſtom in that pariſh, to ſet forth tithe lambs on the *firſt* of *May*; but the court diſallowed of it, for that they were not fit to live without their dams, as appeared by the depoſitions in the cauſe; and it was referred to three neighbouring juſtices of the peace, to inquire what was a fit time for ſetting forth tithe lambs in that country; who certified the *firſt* of *Auguſt*, in their judgment, to be a proper time; and the court approved of it.

See the next caſe of *Crofts: Reignolds* againſt *Vincent*, under *Trinity* Term, 10 *Geo.* I. *Brinklow* againſt *Edmonds*, under *Michaelmas* Term, 4 *Geo.* II. *Webb* againſt *Gifford* under *Trinity* Term, 5 *Geo.* II.

Crofts, Rector of *Upper Clatford*, in *Hampſhire*.

Cuſtom to ſet forth tithe-lambs on Saint *Mark's* day, void. 3 *Burn's* Eccleſ. Law, 456, 457.

THE defendant inſiſted on a cuſtom in that pariſh to ſet forth tithe lambs at Saint *Mark's* day: the court declared it to be a void cuſtom; and that the time for ſetting forth tithe lambs, is, when they are fit to live without their dams, and thrive on

the ſame food that their dam lives on, and when the owner weans his own.

See the caſes of *Heaton* againſt *Regal*, under Term; *Reignolds* againſt *Vincent*, under *Trinity* Term, 10 *Geo.* I. *Brinklow* againſt *Edmonds*, under *Michaelmas* Term, 4 *Geo.* II. *Webb* againſt *Gifford*, under *Trinity* Term, 5 *Geo.* II.

Hilary Term, 8 Geo I.

A. D. 1721.

In the *Exchequer.*

Greenaway againſt the Earl of *Kent.*

BILL was exhibited in 1704, by the vicar of *Watsford*, in the county of *Hereford*, ſetting forth, that the defendant was poſſeſſed of a coppice, called "*The Chace*," and other wood land within the ſaid pariſh, and to have the tithe of the wood cut down, and bark; and inſiſted, that if any of the wood was above twenty years growth, yet the ſame were but ſome few poles growing *ſparſim* from the ſtubs or ſtocks of other trees, and not fit for timber, but only for fire-wood, or making laths, and were accordingly ſold to the iron-maſters, who uſed the ſame for fuel at their furnaces.

Timber trees of above twenty years growth, if cut and corded for fuel, are titheable, otherwiſe not; but no tithe is due of the *bark* of *ſuch* trees, which are *not corded*. *Bunb* 98. pl. 156.

The defendant, in his anſwer, inſiſted, that the woods, *&c.* conſiſted of an innumerable quantity of timber trees, of oak of thirty years growth and upwards, and alſo of coppice and underwood, under twenty years growth; that he cauſed the timber trees (which he hopes to prove were above thirty years growth) to be ſtripped, and the bark to be perked by

itſelf, and ſo delivered to the buyers, and the timber trees to be fallen, and the ſound and merchantable parts thereof to be ſold for the country's uſe, and the parts not employed for the defendant's own building and repairs, and the lops and offal, he cauſed to be ſized into billets, and ranked and corded by itſelf, apart from the coppice wood, and delivered the ſame to iron-maſters, and inſiſts, that the timber trees were free from the payment of tithes.

But the court decreed, that all the wood above twenty years growth (as well as underwood) *cut and corded*, and the bark ſtripped from the ſame, ſhould pay tithes, but that no tithe was due from ſuch wood above twenty years growth, nor of the bark thereof, which was *not corded*.

Note; The decree in the cauſe of *Buckle* and *Vincere* [which are under *Hilary* Term, 3 *W.* & *M.*] was cited by the court, and plainly makes timber trees, above twenty years growth, titheable, if *cut and corded* for fuel; by *Bury*, *Price*, and *Smith*, barons.

See the caſes of *Perch* againſt *Gee*, under *Hilary* Term, 9 *Wil.* III. *Gee* againſt *Perch*, under *Eaſter* Term, 2 *Anne*.

February 21, A. D. 1721.

In the *Exchequer*.

Pocock againſt *Titmarſh*.

Houſes in *Southwark*, titheable. *Bunb* 102. pl. 161.

BILL for tithes of houſes, not within the city of *London*, and ſo not within the ſtatute of 37 *Hen.* VIII. chap. 12.

It

It was admitted by the plaintiff, that the demand was againſt common right, and he did not alledge this payment to be either by cuſtom or preſcription, but that this was the only proviſion for Saint *Saviour's*, *Southwark*, in right of which church the plaintiff claimed.

It was proved, that the houſes in the pariſh had, ſince the year 1653, *generally* paid twelve ſhillings *a year*; but no proof that defendant's houſe had paid for twenty-five years, but by one ſingle witneſs; yet the court decreed an account without directing an iſſue.

Account decreed, without directing an iſſue.

Eaſter Term, 9 Geo. I.

April 19, A. D. 1722.

In the *Exchequer*.

Goddard againſt *Keeble*.

BILL by the rector of *Caſtle Eaton*, in the county of *Wilts*, for tithe; the defendant inſiſts upon ſeveral *moduſes*.

Moduſes diſallowed, no time being mentioned when payable. *Bunb.* 105. pl. 164.

1. Threepence for every milch cow, in lieu of tithe milk.

Milch cow.

2. Threepence for every lamb yeaned in the pariſh; but this was given up as too rank, for ten threepences amount to the preſent value of a lamb.

Three-pence for a lamb too rank, a *modus*.

3. One ſhilling for a dry cow and ox depaſtured, *&c.*

Dry cow, and ox.

Dry unſhorne ſheep.

4. One penny for each dry ſheep, not ſhorne in the pariſh.

Colts.

5. Threepence for every colt fallen.

It not being alledged at *what time* theſe *moduſes* were payable, the defendant was decreed to account. *Note*, the *reporter* believes this is the *firſt* inſtance in a court of equity, that *moduſes* were diſallowed, upon this reaſon; but the *editor* of *Banbury* refers to the caſes of *Pemberton* and *Sparrow*, [which ſee under *Trinity* Term, 9 Geo. I.] and of Saint *Eloy* and *Prior*, [which ſee under *Hilary* Term, 10 *Geo.* I.] and alſo further obſerves, that there was the ſame reſolution, in ſeveral caſes ſince that time.

April 28, A. D. 1722.

In the *Exchequer*.

Baker againſt *Planner*, and others.

Quantities and values of tithes muſt be ſet forth particularly. *Bunb.* 108. pl. 168.

BILL for tithes: exception taken to the anſwer, that the defendant doth not ſet forth quantities and values; the defendant ſets forth what titheable matters he had, and ſays, he had no other titheable matters whatſoever.

Barons *Price* and *Page* thought this inſufficient; and that he ſhould have ſet forth particularly "† *that he had not ſuch and ſuch things as charged in the bill*;" and upon their opinion, the exception wss allowed.

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* The reporter *notes*, that this ſeems very extraordinary, and contrary to the conſtant method of drawing anſwers. Id. ib.

Baron

Baron *Mountague* thought it would be well enough, if the defendant ſays he has no other titheable matters in the bill mentioned; but *note*, then it might be thought inſufficient, if there was (as is uſual) a charge in general in the bill, that the defendant had divers other titheable matters.

See the caſe of *Gumley* againſt *Fontleroy*, under *Eaſter* Term, 7 *Geo.* I.

Trinity Term, 9 Geo. I.
May 28, A. D 1722.

In the *Exchequer*.

Sir *James Mountague*, Lord Chief Baron.
Sir *Robert Price*.
Sir *Francis Page*.
Sir *Jeffery Gilbert*.

Sir *Robert Raymond*, Attorney General,
Sir *Philip Yorke*, Solicitor General,
Sir *William Thomſon*, Recorder of *London*.

The Biſhop of *Lincoln* againſt Sir *William Ellis*, and others.

UPON a bill for tithes, as rector of *Barney* in the county of *Lincoln*; the defendants inſiſted, that the lands were parcel of one of the greater monaſteries, diſſolved by the ſtatute of 31 *Hen.* VIII. chap 13.

Decree in a cauſe, wherein the leſſee only, and not the impropriater, was a party, admitted to be read in evidence. *Bunb.* 110. pl. 171.

A decree was offered to be read in evidence, wherein Sir *Thomas Skipwith*, leſſee of the then biſhop of *Lincoln*, was plaintiff, againſt the then tenants of the land; but it was objected to the reading of this; for that no admiſſion of the leſſee ſhall bind him that has the inheritance, and who was no party to the decree.

But by the opinion of the Lord Chief Baron *Mountague*, and Baron *Price*, it was read; who ſaid, they ſhould have made no doubt of reading it, if the leſſee had prevailed; and therefore they ſaw no reaſon, why it ſhould not, ſince he did not prevail; but baron *Page* was of another opinion, and his reaſons ſeemed to be the better.

June 7, A. D. 1722.

In the *Exchequer*.

Pemberton and *Sparrow*, and others.

Modus diſallowed, no time being mentioned when payable. *Bunb.* 105. n.

IN this caſe there was the ſame reſolution, as in that of *Goddard* againſt *Keeble* [which ſee under *Eaſter* Term, 9 *Geo.* I.] of Saint *Eloy* and *Prior*. [which ſee under *Hilary* Term, 10 *Geo.* I.]

June 21, A. D. 1722.

In the *Exchequer*.

Penny, executor of *Penny*, againſt *Hoper*.

Tithe muſt be ſhewn in a bill for tithes, where there is a lay-impropriator. *Bunb.* 115. pl. 178.

IN a bill for tithes in *Luction*, in the county of *Hereford*, the plaintiff ſets out his tithe, that Sir *Herbert Croft*, being poſſeſſed of a long term for years unexpired,

expired, of the great and ſmall tithes, demiſed to the plaintiff's teſtator.

It was objected, at the hearing, that the plaintiff had made no ſufficient title; for firſt they had not proved Sir *Herbert Croft's* leaſe, ſo that it might appear, whether his term was ſubſiſting or not; and if they had, *that* alone would not be ſufficient, for they ought to have ſhewn, (being a lay impropriation) in whom the fee is veſted, and derived the title from thence; and the court ſeemed of this opinion; but let the cauſe ſtand over with liberty to amend.

See the rehearing of this cauſe, under *Michaelmas* Term, 9 *Geo.* I.

June 22, A. D. 1722.

In the *Exchequer.*

Baily againſt *Worrall.*

In a bill for a portion of tithes, in a neighbouring pariſh, the vicar of *that* pariſh muſt be a party. *Bunb.* 115. pl. 179.

BILL by plaintiffs, as leſſees of the rector of *Winterbourne*, for a portion of great and ſmall tithes in *Stoke Gifford*, being a neighbouring pariſh, the tenants and the lay impropriator, who claimed the great tithes in *Stoke Gifford*, were made parties; but becauſe the vicar of *Stoke Gifford*, who might be intitled to the ſmall tithes, was not made a party, the bill was ordered to be diſmiſſed; but, upon application, ſtood over with liberty to amend.

Michaelmas * Term, 9 Geo. I.

October 26, A. D. 1722.

In the *Exchequer*.

Thomas Bennet, doctor of divinity, vicar of Saint *Giles*'s, *Cripplegate*, *London*, } Plaintiff.

Michael Treppaſs, *Richard Bocket*, *Nicholas Witchell*, pariſhioners of the ſaid pariſh, } Defendants.

On a bill brought for tithes of houſes in *London*, after the rate of two ſhillings and nine-pence in the twenty ſhillings rent, according to the ſtat. 37 *Hen.* VIII. chap. 12. the court of *Exchequer* directed an iſſue, to try whether any leſs ſum or ſums of money, than ſuch cuſtomary payment, ſet up by the defendants, had ever been paid; and that too, though there was no proof of any regular *modus*. 2 *Brown*. 437. pl. 69. *Gilb*. Eq. Rep. 191. 8 *Vin*. Abr. 568. pl. 3. n. *Bunb*. 106. pl. 166.

THE plaintiff became vicar of the ſaid pariſh, in *April*, 1717, and in *Trinity* Term, 1719, he exhibited his bill in the court of *Exchequer* againſt the defendants, as occupiers of houſes within the for tithes in *London*, after the rate of two ſhillings and nine-pence in the pound, according to the yearly rent of their reſpec-

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* It is ſaid, that this caſe being a matter of great conſequence, the court of *Exchequer* took time to conſider of their decree. See *Bunb*. 107. And ſo they certainly did; for it appears, that this ſame cauſe came before the barons at no leſs than *ſeven* different periods, in various ſhapes, *viz*. in *Trinity* Term, 1719, 2 *Brown*, 437. pl. 69. *Oct*. 27, 1738, 2 *Brown*, 438 *February* 22. 8 *Vin*. Abr. 568. pl. 3. n. *April* 18, 2 *Brown*, 439. *April* 26. *Bunb*. 106. pl. 166. and *October* 26, 2 *Brown*, 437. pl. 69. id. 439. *Bunb*. 107. and all in the year 1722; as alſo in *January* 31, 1723. *Bunb*. 143. pl. 223. and in *Michaelmas* Term, 12 *Geo*. I. 1726. *Gilb*. Eq. Rep. 191. beſides the hearing on the appeal, *March* 7, 1722, in the lords, 2 *Br*. Ap. in Parl. 439.

tive

tive houſes, and he grounded this demand, upon a † ſtatute and decree of 37 *H.* VIII. chap. 12. ſect. whereby it was decreed and enacted, "That the citizens and inhabitants of the city of *London*, and liberties of the ſame, ſhall yearly, without fraud or covin, for ever pay their tithes to the parſons, vicars, *&c.* after the rate following, *viz.* of every ten ſhillings rent by the year, of all and every houſe or houſes, ſhops, warehouſes, cellars, ſtables, and every of them within the ſaid city and liberty of the ſame, ſixteen-pence halfpenny; and of every twenty ſhillings rent by the year, of all and every ſuch houſe and houſes, ſhops, warehouſes, cellars, ſtables, and every of them, within the ſaid city and liberties, two ſhillings and ninepence, and ſo above the rent of twenty ſhillings by the year, aſcending from ten to twenty ſhillings, according to the rate aforeſaid.

The defendants, by their anſwer to this bill, admitted, that during the time therein mentioned, they had reſpectively occupied houſes within the ſaid pariſh, *viz.* the defendant *Treppaſs* an houſe of the yearly value of twelve pounds; the defendant *Bocket*, a houſe of the yearly value of ſixteen pounds; and the defendant *Witchell*, two houſes of the yearly value of twenty-two pounds. But they inſiſted, that no ſuch a demand was ever made as two ſhillings and nine-pence in the pound, by any former vicar of the pariſh; nor was the ſame ever heard of within the pariſh, till the plaintiff became vicar, which was but two years before the commencement of the ſuit; and

† It was ſaid in this caſe, that the right of the vicar to ſmall tithes could not be deſtroyed, but by an uniform conſtant payment. See the ſtatute. *Bunb.* 107.

they

they further inſiſted, that they were exempt from ſuch payment, after the rate of two ſhillings and nine-pence in the pound, either by virtue of a proviſo in the ſaid ſtatute and decree, whereby it was provided and decreed, "That where a leſs ſum than after the rate of ſixpence halfpenny in the ten ſhillings rent, or leſs ſum than two ſhillings and nine-pence in the twenty ſhillings rent, hath been accuſtomed to be paid for tithes, that then in ſuch places the citizens and inhabitants ſhall pay only after ſuch rate as has been accuſtomed, or by ſome other lawful ways or means."

The cauſe, being at iſſue, and witneſſes examined, was heard on the 27th of *October*, 1720, and there being no proof that the two ſhillings and nine-pence was ever paid or demanded within the ſaid pariſh, till by the plaintiff's bill, and ſome doubts ariſing concerning the ſame, the court directed that a caſe, as it appeared upon the evidence, ſhould be ſtated and ſettled by counſel, on both ſides; which was accordingly done to the effect following, *viz.*

That there was no proof in the cauſe whether the houſes in queſtion were, or any of them was, in the leaſe, at the time of making the ſaid act, or not, or that the ſum of two ſhillings and nine-pence in the pound was at any time paid according to the value of the houſes, by virtue of the ſtatute and decree of the 37 *Hen.* VIII. but it was proved by ſome of the plaintiff's witneſſes, in their croſs examinations on the part of the defendants, that, till the time of the preſent vicar, they never heard of any ſuch demand as two ſhillings and nine-pence in the pound for tithes, within the ſaid pariſh. That in two ancient tithe-

tithe-books there appeared to be charged for tithes againſt the names of the then occupiers of *Treppaſs's* houſe, the ſeveral ſums of five ſhillings, and three ſhillings and four-pence; and in another ancient tithe-book, the ſeveral ſums of five ſhillings, and three ſhillings and four-pence, and two ſhillings and ſix-pence; which laſt mentioned ſums of three ſhillings and four-pence, and two ſhillings and ſix-pence, were proved to be the collector's hand-writing, but the five ſhillings charge againſt *Treppaſs's* houſe, was of another hand-writing: and, in another book, the ſeveral ſums of three ſhillings and four-pence and two ſhillings and four-pence, were ſo charged, and proved to be of the collector's hand-writing; and that no certain ſum annually, or *modus*, in relation to *Treppaſs*'s houſe, was proved to have been paid, but as aforeſaid. That in another tithe-book, commencing in the year 1708, and ending in the year 1713, *Bocket*'s houſe was charged one ſhilling and ſixpence, and *Witchell*'s houſe one ſhilling each quarterly. It was proved by one *Suretys*, that for nine years, during the time biſhop *Fowler* was vicar of the pariſh, he, the ſaid *Suretys*, lived in *Treppaſs*'s houſe; and, during that time, never paid more to the vicar than ten ſhillings a year, two ſhillings and ſixpence a quarter: therefore the queſtion on the ſaid caſe was, whether two ſhillings and nine-pence in the pound of the yearly rents of the ſaid defendants reſpective houſes, was due for tithes, by virtue of the ſaid ſtatute, and decree of 37 *Hen.* VIII. or not?

This caſe was twice argued by counſel on both ſides; firſt, on 18 *April* 1722, and afterwards on 26th *October* following.

For

Gilb. Eq. Rep. 192.

For the plaintiff it was argued, that the ſum of two ſhillings and nine-pence in the pound, ought to be paid by the decree on the ſtatute of 37 *Hen.* 8. *cap.* 12; and they look upon that ſtatute to be the general law of tithing in the city; and that if the defendant could not ſet up a *modus* or compoſition, whereby it appeared, that they paid leſs, that this rule of tithing ought to take place; and they made ſeveral objections to this *modus* ſet up by the defendants; as

Note, No tithes of houſes are due of common right.

Firſt, That it was not proved to be time out of mind, and nothing leſs than an immemorial cuſtom ought to be a bar againſt a common right.

Secondly, It was not ſet out, that the *modus* was paid annually, or half yearly; and if the particular time of the payment of a *modus* be not ſet out, that *modus* is not well pleaded, nor is it a good bar; and the reaſon is, becauſe the original agreement muſt be certain, that the perſon may know when and what to demand; but here there was no time ſet forth in this *modus*; and therefore it could be no good bar; nor was the *modus* tendered to the plaintiff.

A *modus* is to be tendered. *Quære.*

Bunb. 106. pl. 166. *Gilb.* Eq Rep. 192.

In this caſe they quoted for the plaintiff a decree, in the 16 *Jac.* I. wherein the court had decreed two ſhillings and nine-pence in the pound; and likewiſe the caſe of Saint *Swithin's*, *Sheffield* and *Serjeant*, in *Michaelmas* 1657; and likewiſe the caſe of *Humfreville* and *Plumſtead*, *Trin.* 27 *Car.* II. *Grant* and *Cannon*, *Mich.* 5 *Wil.* and *Mary*. Sir *Patience Ward* and others *verſus Kidder*, 5 *Wil.* and *Mary*. *Sayer verſus Munford*, *Mich.* 6 *Wil.* and *Mary*; and the caſe of Saint *Bride's*, *Townly* and *Wilſon*, 7th *July*, 1705; in all which caſes, the court had decreed the

ſum of two ſhillings and nine-pence per pound, according to the ſaid ſtatute and decree.

And Mr. Baron *Price*, who was of opinion, for the plaintiff, ſaid, the ſtatute was thought to be in derogation of the rights of the clergy; for it appears by *Linwood* 201, and by *Stow*, that the laity uſed to pay one halfpenny in the pound, to the clergy, upon every *Sunday* and holiday, which came to a greater ſum than two ſhillings and nine-pence, *viz.* three ſhillings and five-pence in the pound. *Bunb.* 107. See "*Bohun's* Law of Tithes," 441, &c.

But it was reſolved by the three † judges, that the caſe upon this ſtatute, was not like a *modus*; for the decree in the ſtatute is, that all houſes within the city of *London* and liberties, ſhall pay two ſhillings and nine-pence for every twenty ſhillings rent; and then comes the proviſion in the ſect. 18. † *Mountague, Page, & Gilbert.* *Bunb.* 107.

"Provided alſo, and it is decreed, that where a leſs ſum than two ſhillings and nine-pence in the twenty ſhillings rent, has been accuſtomed to be paid, for tithes, that then, in ſuch places, the ſaid citizens and inhabitants ſhall pay but only after ſuch rate, as has been accuſtomed."

Now they ſaid it was plain by the ſtatute itſelf, and by the citation before mentioned in *Linwood*, that in many places in the city, there had been a cuſtom to pay tithes, according to the pound rate; and theſe the ſtatute never intended to alter or inlarge, but to eſtabliſh; for the ſtatute was not deſigned in deſtruction of any ſettled right: nay they took it farther, that if there had been a payment of leſs ſums by agreement between the parſon and pariſhioners, they were

were confirmed by the ſtatute; becauſe it was the deſign of the ſtatute to ſettle ſuch cuſtomary payments; and it was their deſign, that they ſhould not be unravelled on either ſide; and accordingly ſuch cuſtomary payments and agreements have been complied with ever ſince the ſtatute. And

That leſs ſums have been paid by almoſt every pariſhioner to the parſon; and therewith they have been content; and although ſeveral decrees have been made in this court for payment of two ſhillings and nine-pence in the pound; yet no cuſtomary payments in any pariſh, have been ſet aſide or broke through; but theſe matters have been compounded between the parties; and the manner of tithing has continued the ſame in each pariſh, except in *ſuch pariſhes* as are otherwiſe regulated by the ſtatute, 22 *Car.* II. c. 15.

See "*Bohun's* Law of Tithes," 463.

They ſaid, that ſect. 18 was a perfect exemption of all thoſe, that had paid leſs ſums, out of the decree; and therefore this could not be urged as a *modus*, or ſet up in bar of tithes; for tithes were originally due; and therefore the bar muſt be complete; but there are no tithes of houſes due of common right; for they are none of thoſe things that *renovant in annum*; and therefore the common law (which follows the Levitical pattern) did not make them titheable; and therefore, they are titheable only by cuſtom or agreement, where there have been ſuch cuſtoms and agreements.

No tithes of houſes due of common right.

The new rate of two ſhillings and nine-pence in the pound was ſuper-induced by the decree; and it is a ſtrange thing to ſay that the decree was in prejudice of the clergy, when it appears that leſs ſums are

now

now conſtantly paid for houſes in the city, than what would be paid if they were rated under the decree. And note, it appears the antient payment, in lieu of tithes of houſes in *London*, were ſomewhat leſs than two ſhillings and nine-pence in the pound.

But it plainly appears, that before the diſſolution of monaſteries a great deal of ſervice in *London* was performed by the regular prieſts; who not only ſaid their maſſes, but viſited the ſick, and performed offices of devotion in many parts of the city; and when they were extirpated, the duty fell upon the parochial clergy; and then it was neceſſary, that their maintenance ſhould be encreaſed; and therefore this decree was made, that all perſons ſhould pay the received rents for houſes (that is) where there had been accuſtomed payments, the tithes were to be continued payable according to that cuſtom; and where there was no immemorial cuſtom, yet if there had been by agreement, *&c.* a payment for eight years paſt, this, according to the frame of the ſtatute, is to be looked upon as cuſtomary payment; for the diviſions, and ſeverances of the houſes, wharfs and warehouſes, were to be as they had been for eight years paſt; ſo that the conſtruction ſeems to be, that if there had been an agreement to pay tithes for eight years paſt, they were accuſtomed payments within the ſtatute; and this will appear from an uniform notion, that if there were tithes, by cuſtom or by agreement, for eight years paſt, they are within ſect. 18 of that ſtatute.

See "*Bohun's* Law of Tithes," 440.

But where there were no ſuch accuſtomed payments, there the ſtatute is introductive of a new law, and lays the charge upon all the others, to pay two ſhillings and nine-pence in the pound.

As

Baron *Page*

As to the objection, That there was no particular time of payment alledged, Baron *Page* ſaid, that the ſtatute by ſect. 11 hath appointed the payment of tithes quarterly; and therefore it need not be ſet out in the bill, as the authoriſed time of payment.

But it ſeems doubtful, whether that proviſo extends any farther than to the two ſhillings and nine-pence mentioned in the decree, and not to the accuſtomed payments, mentioned in ſect. 18 of the act.

But in this all the three judges agreed, that they were not obliged to ſet up thoſe cuſtomary payments as a *modus* in bar of tithes; for theſe cuſtomary payments are exemptions of the decree; and therefore, in what manner ſoever they have been paid, if there has been a cuſtomary payment ſince the ſtatute, of a leſs ſum, they cannot be bound by the decree to pay two ſhillings and nine-pence in the pound.

Now if all that pay leſs ſums be exempted from payment, under the decree, and are not within the decree, nor within the obligation of the ſtatute, we ought to try whether there be ſuch accuſtomed payments or not, eſpecially ſince, in this caſe, it appears by the books of the parſon, that leſs ſums were collected; and it could not have been preſumed, that they would have been collected in that manner, if they had not been old accuſtomed payments; for how could thoſe ſums have come into the parſon's books, if they had not been the old accuſtomed dues!

Note.

And the difference of the payments in the books may be reconciled by ſuppoſing ſome of them to be quarterly, ſome half-yearly payments.

This

This caſe relates to the inheritance, and the inheritance is to be bound by our decree; and where the inheritance is charged merely by cuſtom, it is uſual and juſt, if the parties deſire it, to try ſuch cuſtom at law.

The court conceiving ſome doubt in relation to theſe payments, ordered, that it ſhould be referred to a trial at law, upon this iſſue, *viz.* Whether any, and what ſum, and what ſum or ſums, leſs than two ſhillings and nine-pence in the twenty ſhillings rent had been accuſtomably paid by the defendants for tithes, for any and which of the houſes in poſſeſſion of the defendants, or any, and which of them; although no proof, that there had been any regular *modus*.

2 *Brown*, 439. *Gilb.* Eq. Rep. 194.

8 *Vin.* Abr. 568. pl. 3. n.

In this caſe were quoted, 2 *Inſt.* 660. *Noy*, 130. *Hardr.* 116. *Watſon*, 387 to 399. *Cro. Car.* 596. *Yelv.* 31. *Moor*, 912. 1 *Co.* 15. *Grant's* caſe. *Littl.* Rep. 102, 141. *Degge*, 351. *Hob.* 11.

Gilb. Eq. Rep. 194.

Bunb 106. pl. 166.

In the *Exchequer*.

At the Sittings at *Serjeant's-Inn Hall, Chancery-Lane*, after the Term.

Penny againſt *Hopper*.

THIS cauſe came on again, and the plaintiffs had amended their title in *exhibits*, by ſhewing a leaſe from the impropriator to Sir *Herbert Croft*; but it was objected, for the defendants, that the plaintiff had not amended his bill; and conſequently had not given the defendants an opportunity of controverting the plaintiff's title; and upon this objection, the

This cauſe put off *again*, with liberty to mend. *Bunb.* 115. n.

cauſe was *again* put off, with liberty for plaintiff to amend.

See this ſame caſe under *Trinity* Term, 9 *Geo.* I.

December 7, A. D. 1722.

In the *Exchequer*.

At *Serjeant's-Inn Hall, Chancery-Lane.*

Lord againſt *Turk.*

Exemption or diſcharge of lands from tithes, they being parcel of a monaſtery of the *Ciſtertian* order. *Bunb.* 122. pl. 190.

BILL by the vicar of *Piſcburch*, in the county of *Suſſex*, for tithes; the defendant inſiſts the lands were parcel of the monaſtery of *Roberts-bridge*, which was of the *Ciſtertian* order; and therefore diſcharged, being diſſolved by the ſtatute of 31 *Hen.* VIII. ch. 13. as of one of the greater abbies; but *note*, lands, though of the *Ciſtertian* order, were not diſcharged, but *quam diu in propriis manibus*; and even not all thoſe, but only *ſuch* as were in them before the council of *Lateran*, as is expreſſed in that council, which was held 5 *Hen.* II. A. D. 1179.

The method of proving, whether lands were purchaſed before or ſince the council of *Lateran*, in the year 1179, is only by payment of tithes.

The method of proving, whether the lands were purchaſed before or ſince the council of *Lateran*, is only by payment of tithes, which will induce a preſumption, that they were purchaſed after; and, *by the court*, the defendant was decreed to account; for that it appeared, that the lands were in tenants hands, and conſequently not diſcharged when they came to *Hen.* VIII.

See the caſe of *Stavely* againſt *Ullithorn*, under *Eaſter* Term, 8 *Car.* II. *Wilſon* againſt *Redman*, under *Michaelmas* Term, 12 *Car.* II.

Hilary

Hilary Term, 9 Geo. I.

A. D. 1723.

In the *Exchequer.*

Bate againſt *Hodges.*

BILL by the rector of *Wareham* in the county of *Kent* for tithes; the defendant inſiſts upon this *modus*, *viz.* one ſhilling an acre for marſh land, four-pence an acre for up-land, payable at *Michaelmas*, for hay and all ſmall tithes within the pariſh (except hops).

Modus for marſh land, up-land, hay, and all ſmall tithes. *Bunb.* 125. *pl.* 196.

Note; it was admitted, if this *modus* had been for tithe hay only, or the tithe ariſing on the land, the one ſhilling had been too rank.

What *modus* too rank for hay.

Baron *Price* was of opinion, this was (as laid) a void *modus*; *Page* and *Gilbert*, barons, that it was good, and decreed accordingly, for the defendants.

See this cauſe reheard, under *Michaelmas* Term, 11 *Geo.* I. *Burwell* againſt *Coats*, under *Eaſter* Term, 10 *Geo.* I.

A. D. 1723.

In the *Exchequer.*

Tully againſt *Kilner.*

BILL by the rector of *Aldingham*, in the county palatine of *Lancaſter*, for the tithes of ley-ground formerly uſed as arable; but (ſince) convert-

Modus of peat and turf, in lieu of tithe hemp, flax, and hay, void for uncertainty, and for that no right of *turbary* alledged. *Bunb.* 126. *pl.* 197.

ed into hay ground; the defendant inſiſted upon this *modus*.

That the occupiers of ancient tenements, within particular vills, or townſhips (expreſſed) within the ſaid pariſh, with their own carts, carriages, and horſes, led and carried, and ought to lead and carry, a *cart-load* of peat and turf, from *Ulverſton moſs* to the parſonage-houſe, for the uſe of the parſon and rector, his farmer or deputy, on ſuch a day, or within the ſpace of every *two years*, as they have or ſhould require the ſame, in full diſcharge of all the tithe of hemp, flax, and hay, growing or ariſing, on the ſaid ancient tenements.

This was held to be a void *modus* by *three barons*, in the *abſence* of Lord Chief Baron *Mountague*, for a cart-load is too uncertain; it may be drawn by two or ſix horſes; and there is no right of turbary alledged in the parſonage-houſe, or in the defendant's ancient tenements.

A. D. 1723.

In the *Exchequer*.

At *Serjeant's-Inn Hall, Chancery-Lane*.

Lloyd againſt *Mackworth*.

Timber ſhall be preſumed to be of above twenty years growth, unleſs the contrary be proved. *Bunb.* 126. pl. 198.

BILL for tithe-wood; the defendant inſiſts, that it was timber; but does not ſay that it was above twenty years growth.

By the court, we will preſume timber to be above twenty years growth, unleſs the plaintiff proves the contrary.

Hilary

Hilary Term, 9 Geo. I.
A. D. 1723.

In the *Exchequer*.

Doctor *Bennet* againſt *Treppaſs* and others.

Books of former rectors ordered to be produced on trial of iſſue, whether any variation had been made, as to ſums paid for tithes of houſes in *London*, according to ſtatute of 37 *Hen.* VIII. chap. 12.

AN iſſue was directed in this cauſe, to try, whether there had been any variation in the payment of tithes or ſums of money in lieu of them, for houſes in *London*, according to ſtatute of 37 *Hen.* VIII. chap. 12.

London. Bunb. 143. pl. 223. 37 *Hen.* VIII. chap. 12.

Iſſues are to inform the *conſcience* of the court.

It was now moved, that the plaintiff ſhould produce at the trial, the books of the former rector; and although it was objected, that theſe were properly private books, and the plaintiff's own evidence; yet as they had before been produced at the hearing of the cauſe, and as the iſſue to be tried is to inform the conſcience of the court, the jury ought to have all the light the court can give them; ſo *by the court*, the plaintiff was ordered to produce theſe books at the trial.

See the next caſe.

See alſo the caſes of Doctor *Burgeſs* againſt *Symons*, both under *Trinity* and *Michaelmas* Terms, 4 *Car.* I. and of the parſon of Saint *Buttolph*, under the laſt mentioned term; and of *Langham* againſt *Baker*, under *Trinity* Term, 10 *Car.* II.

March 7, A. D. 1723.

In the Houſe of Lords.

Thomas Bennet, Doctor of Divinity, Vicar of Saint *Giles*, *Cripplegate*, *London*, } Appellant.

Michael Treppaſs, *Richard Bocket*, and *Nicholas Witchell*, pariſhioners of the ſaid pariſh, } Reſpondents.

a *Br.* Ap. in Parl. 439. *Gilb* Eq. Rep. 192.
b *Vin.* Abr 568. pl. 3. n. *Bunb.* 197.

FROM the decretal order made in this cauſe by the court of *Exchequer*, [which ſee under *Michaelmas* Term, 9 *Geo.* I.] the plaintiff appealed to the Houſe of Lords, inſiſting, that no iſſue whatever ought to have been directed; becauſe there could be no occaſion to ſend thoſe facts to be tried by a jury, which had already been ſettled and agreed to by the conſent of both parties, in the above caſe; and that with ſo much care and deliberation, as to take up fifteen months in preparing the ſame to the appellant's great delay and prejudice: that it appeared from the anſwer of the reſpondents, that there was no one cuſtomary rate in that part of the pariſh of *Cripplegate*, which lies within the city of *London*; the reſpondent *Treppaſs*'s pretended payment being after the rate of about twelve-pence in the pound, and *Becket*'s and *Witchell*'s after the rate of about four-pence in the pound, and no more; and for this reaſon alſo, it was apprehended an iſſue was unneceſſary; that the reſpondents had not given the leaſt colourable proof, of any *modus* or cuſtomary payment whatſoever, ſo as to bring them within the proviſo of the act of Parliament; nothing more being proved than that, between the years 1708 and 1713, *Becket*'s houſe had been charged with.

with one ſhilling and ſix-pence, and *Witchell's* houſes with one ſhilling each; and as to *Treppaſs's* houſe, that different ſums had formerly been paid, *viz.* three ſhillings and four-pence, and two ſhillings and ſix-pence: that the reſpondents ought not, in this caſe, to have been admitted to read their proofs, to ſupport ſuch pretended cuſtomary rates, becauſe they had not fixed or alledged any time when the ſame were payable; and by the conſtant practice of the Court of *Exchequer*, a *modus* is held to be void, where no time is alledged or appointed for the payment of it: that the neglect of the appellant's predeceſſors to demand according to the ſtatute, could be no prejudice to right veſted by expreſs words of that ſtatute, which was made to regulate and eſtabliſh an immemorial cuſtom of paying tithes in * *London*; and therefore, it was hoped, that the decree would be reverſed; and that the appellant ſhould have an account from the reſpondents according to the ſtatute, ſince he muſt either have that or nothing, there being no proof of any cuſtomary rate payable for the reſpondents houſes, ſufficient to ground a demand upon.

On the other ſide, it was ſaid, to be uſual for courts of Equity, to direct trials, where matter of facts appeared doubtful, eſpecially if ſuch facts depend upon cuſtom and uſage, which are matters moſt proper to be determined by a jury: that the conſtant acceptance of leſſer ſums than two ſhillings and nine-pence in the pound, was apprehended to be ſufficient to induce the court, to direct ſuch iſſue as they

* See the note ſubjoined to the appellant's caſe, at the end of this, in 185.

had done, as it could not be preſumed, that the vicars of the pariſh would ſo long have accepted of ſuch leſſer payments, if two ſhillings and nine-pence in the pound had been due to them, becauſe the ſame would make the living three thouſand pounds per annum more than it was now worth, being only about eight hundred pounds per annum: that as it appeared, that leſſer ſums than two ſhillings and nine-pence in the pound had been paid for the reſpondent's houſes reſpectively, it was a ſtrong evidence of an accuſtomed payment; and eſpecially in this caſe, where the full ſum of two ſhillings and nine-pence had never in any ſingle inſtance been paid; nor was there any evidence that contradicted the payment of theſe leſſer ſums, or proved any variation in thoſe payments. *As to the* objection made by the appellant, *that the direction* of the trial would be the occaſion of great delay and expence to him: it was ſaid, that the contrary was true; for that a trial might have been had, and a final decree made, in leſs time, and at leſs expence, than what was occaſioned by the preſent appeal; but it was manifeſt, that the avoiding either expence or delay, had been very little in the appellant's view; there being a clauſe in the aforeſaid ſtatute or decree, "That if any variance, controverſy or ſtrife, do or ſhould ariſe within the ſaid city, for the non-payment of tithes, *&c.* or if any other doubt ariſe, upon any other thing contained within the ſaid decree; that upon complaint made by the party grieved to the Mayor of the city of *London* for the time being, the ſaid mayor, by the advice of the counſel, ſhall call the ſaid parties before him, and make a final end in the ſame, with coſts to be awarded, by the diſcretion of the ſaid mayor and his aſſiſtance;" which method if the appellant had thought fit to have taken, the

matters

matters in queſtion might have been long ſince determined at a very eaſy expence; and therefore it was hoped, that the order would be affirmed, and the appeal diſmiſſed with coſts.

Accordingly, after hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decretal order therein complained of, was *(diſſentiente clero)* juſtly affirmed.

Order affirmed, Lords Journ. vol. 22. p. 109. *Gilb.* Eq. Rep. 194. *Bunb.* 107.

The following note is ſubjoined to the appellant's caſe:

"The appellant humbly hopes he is ſufficiently authorized in affirming, that this right was veſted in the clergy of *London* by the immemorial cuſtom of that city, antecedent to the ſtatute. It appearing, in the caſe of Dr. *Dunn*, related in Sir *H. Calthrop*'s Reports, fol. 62. from the records of *London*, there referred to, and from ſeveral books of great antiquity, that in 13 *Hen.* III. there was an ancient cuſtom, which had then been uſed time out of mind, that proviſion ſhould be made for the miniſtry of *London*, in this manner, *viz.* That he which paid twenty ſhillings for his houſe, ſhould offer every *Sunday*, and every apoſtle's day, whereof the evening was faſted, an halfpenny; and he that paid but ten ſhillings rent yearly ſhould offer but one farthing; which amounted to two ſhillings and ſixpence in the pound in the whole year; there being then, beſides the fifty-two *Sundays*, eight apoſtles days, the vigils whereof were faſted, and no more, which payment continued till 13 *Rich.* II. about which time, the clergy, beginning to inſiſt on offerings to be paid on twenty-two ſaints days more, it then amounted to three ſhillings and three-pence in the pound yearly. And

And, in 38 *Hen.* VI. there was a compoſition between the citizens of *London* and the miniſters, that this payment ſhould be made according to that rate. But diſputes afterwards ariſing, there was a ſubmiſſion to the lord chancellor, and divers others of the privy-council, and they made an order for payment of tithes, according to the rate of two ſhillings and nine-pence in the pound, which was firſt promulged by proclamation, and afterwards eſtabliſhed by act of parliament, 27 *Hen.* VIII. chap. 21. There was another order or decree made to the ſame purpoſe, with ſome addition, and confirmed by act of parliament, 37 *Hen.* VIII. chap. 12. which is the act on which the appellant now founds his demand."

27 *Hen.* VIII. chap. 21.

37 *Hen.* VIII. chap. 12.

See the original caſe and decree, *under Michaelmas* Term, 9 *Geo.* I. and under *Hilary* Term, 10 *Geo.* I.

Eaſter

Eaſter Term, 9 Geo. I.

May 20, A. D. 1723.

In the *Exchequer.*

Evans againſt *Newell.*

BILL for the tithe wood of all extra-parochial lands within the foreſt of *Dean*, by virtue of a grant from King *Edward* the *Firſt*, of all tithes iſſuing from * *aſſarts* within the foreſt, *of new aſſarts, and to be aſſarted*; but by the proofs it appeared, that theſe lands were never grubbed up, but were always wood lands, and no tithes ever paid.

Aſſart means lands grubbed up and made fit for tillage. *Bunb.* 128. pl. 201.

By the court; *aſſart* is only ſuch lands as have been grubbed up, and made fit for tillage; and the bill was diſmiſſed.

See the caſe of *Bond* againſt *Barrow*, under *Hilary* Term, 4 *Geo.* II.

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* See *Spelm.* Gloſſ. verb. "*Aſſart*," *Manwood*, chap. 9. ſect. 4 *Edw.* I. *Extenta manerii*.' Regiſter. *Du Freſne*, verb. "*Aſſart*." *Blount's* Dict. verb. "*Aſſart*." *Cow.* Interpret. verb. "*Aſſart*." *Mod.* Anc. Dial. Exchеq. chap. xiii. One of the defendant's counſel ſaid, that the word "*Aſſart*" was derived either from *exarrando* or *aſſarendo manerii*.' *Bunb.* 129. 2.

May 20, A. D. 1723.

In the *Exchequer*.

Burwell againſt *Coates*.

Whether any difference between lay and ſpiritual perſon, claiming tithes, as to his ſetting forth a title. *Bunb.* 229. pl. 200.

BILL by the plaintiff as leſſee of the impropriate rectory of *Normanby*, in the county of *Lincoln*, under the dean and chapter of *Lincoln*, for tithe hay.

It was inſiſted upon for the defendant, that the plaintiff (being a lay impropriator) had not ſet forth a ſufficient title; and upon *that* the long controverted queſtion, whether there was any difference between a lay and ſpiritual perſon (claiming tithes) was revived, but it was not now determined; *for*, *by* the court, the tithe was well enough ſet forth in the preſent caſe.

Modus of four ſhillings at *Eaſter*, payable in lieu of tithe hay, of a farm, diſallowed as fraudulent and uncertain.

The defendant inſiſted upon a *modus* of four ſhillings, payable at *Eaſter*, in lieu of tithe hay, ariſing on his farm, and other lands particularly ſet forth.

But *by the court*; this is a void *modus*, becauſe it may introduce a fraud; for if a farmer ſhould turn all his arable land into meadow, he would be diſcharged of the whole four ſhillings; beſides, *it* is too uncertain, it not being certain what a farm conſiſts of.

See the caſes of *Bate* againſt *Hodges*, under *Hilary* Term, 8 *Geo.* I. and under *Michaelmas* Term, 10 *Geo.* I.

Trinity

Trinity Term, 9 Geo. I.

May 28, A. D. 1723.

In the *Exchequer*.

William Taylor, Eſq; —— Plaintiff.
Ralph Crayborne, Eſq; — Defendant.

THE plaintiff exhibited his bill this term, in the Court of *Exchequer*, againſt the defendant, ſtating, that *William Redman* of *York*, Eſquire, being ſeiſed in fee, or of ſome other eſtate of inheritance, or poſſeſſed for ſome long term of years, or otherwiſe intitled in his own right, or in truſt for his children, *William Redman*, *Watkinſon Redman*, and *Alice* the wife of *Richard Atkinſon*, in and to all thoſe the tenths and tithes of corn, grain, hay, and other tithes, as well great as ſmall, of what nature and kind ſoever, with all and ſingular the rights, members and appurtenances, yearly ariſing and growing within the villages, fields and hamlets, of *Eaſtneſſe*, *Crook-Holme*, and *South-Holme*, within the pariſh of *Hovingham*, in the county of *York*, by indenture, dated 27*th January* 1721, made between the ſaid *William Redman* of the one part, and the plaintiff of the other part; the ſaid *Redman* demiſed to the plaintiff, all and ſingular the ſaid tithes of corn, grain, and hay, with all and ſingular their rights, members, and appurtenances, yearly; and from time to time coming, growing, increaſing, and renewing within the villages, fields, and hamlets of *Eaſtneſſe*, *Crook-Holme*, and *South-Holme*, or in any of them within the pariſh of *Hovingham* aforeſaid, and late belonging to the diſſolved monaſtery of *Newbrough*, in the ſaid county; and all other the tithes, as well great as ſmall, with their and every

By the ſeveral ſtatutes of diſſolution, tithes in the hands of laymen, are declared to be temporal inheritances, and lay fees; and they have alſo the like remedy in the temporal courts, and may ſue for them in like manner, as for lands, tenements, and other hereditaments; and tithes have at this day all other incidents belonging to temporal inheritances. 2 *Br.* 517. pl. 78.

every of their rights, members and appurtenances, of whatſoever nature, kind, or condition the ſame were; and all his, the ſaid *William Redman's* right, title, intereſt, claim, and demand whatſoever, as truſtee for his ſaid children, of, in, or to the ſaid tithes and premiſes, or any part thereof, to hold the ſame to the plaintiff, his executors, adminiſtrators and aſſigns, from the *25th of March* preceding the date of the ſaid indenture, for twenty-one years, under the yearly rent of twenty pounds: that by this leaſe, the plaintiff became fully and legally intitled to receive, or otherwiſe to have a ſatisfaction made to him for all the ſaid tithes, growing or ariſing within all, or any the places aforeſaid: that the defendant, who was owner and occupier of ſeveral lands, paſture and meadow, within *Eaſtneſſe* aforeſaid, refuſed to pay the plaintiff, or to make him any ſatisfaction, for the ſmall tithes and herbage, ariſing from the appellant's lands in *Eaſtneſſe* aforeſaid, or which did grow or renew in the year 1721, out or upon the ſaid lands and grounds; wherefore the bill prayed, that the defendant might ſet forth the particular quantities and values of the ſaid tithes; and that the plaintiff might have a ſatisfaction for the ſame, and be otherwiſe relieved in the premiſſes.

To this bill the defendant demurred; and for the cauſes of demurrer alledged, that the plaintiff had not by his bill ſet forth, as he ought to have done, how *William Redman*, who thereby appeared to be a layman, became intitled to the tithes demanded by the ſaid bill, whether by grant, preſcription, or otherwiſe, or what eſtate the ſaid *William Redman*, had in the ſaid tithes, or whether he had power to demiſe the ſame; or that any eſtate in the ſaid tithes,

did or could paſs from the ſaid *William Redman* to the plaintiff; for which reaſons, and other defects in the ſaid bill, the defendant prayed the judgment of the court, whether he ſhould be compelled to make any further or other anſwer thereto, and prayed to be diſmiſſed with coſts.

On the 28*th of May*, 1723, this demurrer was argued, when the court were divided in opinion; the Lord Chief Baron *Montague*, and Mr. Baron *Gilbert*, being for over-ruling it; and Mr. Baron *Price* and Mr. Baron *Page*, for allowing it; whereupon, according to the courſe and practice of the court in ſuch caſes, the demurrer was ordered to be over-ruled, but without coſts; and the defendant ſhould put in his anſwer to the ſaid bill.

See this caſe on appeal, by the name of *Croyborne* and *Taylor*, under the year, 1723-4.

July 11, A. D. 1723.

In the *Exchequer*.

At *Serjeant's-Inn Hall, Chancery-Lane*.

Reignolds againſt *Vincent*.

Cuſtom to tithe lambs on Saint *Mark*'s day, is unreaſonable, becauſe the uſual time for tithing them is, when they can live without the dam. *Bunb.* 133. pl. 109.

BILL for tithes (*among the reſt*, of lamb); the defendant inſiſts, that it was cuſtomary to tithe their lambs at Saint *Mark's* day, 25*th April*; but, for the plaintiff, it was ſaid, that by the defendant's own proofs it appears, they generally then are but three weeks old, and cannot live without the dam; but it is uſual to tithe them not *until Auguſt*, and ſometimes not until *Michaelmas*; but the general rule is to tithe them, when they are capable of living without the dam.

And *by the court*, the cuſtom inſiſted upon by the defendant is unreaſonable, and decreed for the plaintiff.

See the caſe of *Brinklow* againſt *Edmonds*, under *Michaelmas* Term, 4 *Geo.* II. of *Crofts* under *Michaelmas* Term, 8 *Geo.* I.

Hilary

Hilary Term, 10 Geo. I.
A. D. 1723.

In the *Exchequer*.

Sir *Robert Eyre*, Lord Chief Baron.
Sir *Robert Price*.
Sir *Francis Page*.
Sir *Jeffery Gilbert*.

Sir *Philip Yorke*, Attorney-General.
Sir *Clement Wearg*, Solicitor-General.
Sir *William Thomſon*, Recorder of *London*.

February 3, A. D. 1723.
Saint Eloy and *Prior*.

THERE was the ſame reſolution in this caſe as in thoſe of *Goddard* againſt *Keeble*, [which ſee under *Eaſter Term*, 8 *Geo.* I.] and of *Pemberton* and *Sparrow*, [which ſee under *Trinity* Term, 9 *Geo.* I.] and upon the ſame reaſon, *viz.* the time not being mentioned.

Modus's diſallowed, the time not being mentioned when payable. *Bunb.* 105. a.

March 11, A. D. 1723.

In the Houſe of Lords.

Ralph Grayborne, Eſquire, Appellant.
William Taylor, Eſquire, Reſpondent.

FROM the order of the court of *Exchequer*, in this cauſe, [which ſee under the name of *Taylor* againſt *Grayborne*, in *Trinity* Term, 10 *Geo.* I.]

2 *Bro.* Ap. in Pral. 516.

the preſent appeal was brought, and on the behalf of the appellant it was inſiſted, that *William Redman*, under whoſe leaſe the reſpondent claimed, not being a rector, or one who was intitled to tithes of common right, the reſpondent ought to ſhew a title in *Redman*; that the appellant might have an opportunity of enquiring into, and ſatisfying himſelf concerning the title, and, if he found it good, that he might ſubmit to pay tithes, without further trouble or expence: That the pretence of title in *William Redman* might be under a term of years which the reſpondent did not ſet forth, nor for what time that term was to continue, and for any thing which appeared by the bill, the term might be expired; that the bill ſtated *Redman* to be intitled in his own right, or in truſt for his children; and that he demiſed to the reſpondent all his right, title, intereſt, claim, and demand, as truſtee for his ſaid children; whereas it did not appear, what the truſt was, or what his eſtate was, which he had as truſtee; neither did it appear, that *Redman*, or any under whom he claimed, ever received the tithes of the lands in queſtion.

On the other ſide it was argued, that tithes in the hands of laymen, are now of a different nature, and come under another conſideration from what they were at common law; for by ſeveral ſtatutes of diſſolution, they were made and declared in the hands of laymen, as temporal inheritances and lay fees; and more particularly, it is enacted by the ſtatute of 32 *Hen.* VIII. chap. 7. that lay perſons ſhall have the like remedy for the recoveries of tithes in temporal courts, and are enabled to ſue for them, in the like manner, as they may for lands, tenements and other hereditaments; and tythes have, at this day all other incidents belonging

longing to temporal inheritance: That the obliging the reſpondent to ſet forth his leſſor's title further than he had in general done, was binding him to a great difficulty, he being no ways privy to or conuſant of his leſſor's right, any other wiſe than as appears from his covenant in the leaſe: That the reſpondent's not ſetting forth the title, as required by the demurrer, was only matter of form, and could have no influence on the merits of the cauſe, or prejudice the appellant in his right to the tithes, if he had ſuch right, or to any diſcharge or exemption from the payment of them: That this judgment, was agreeable to former reſolutions in caſes of the like nature; and even in thoſe where greater exactneſs and certainty was required, than in a bill of this kind; and therefore, it was hoped, that the appeal would be diſmiſſed with coſts.

Accordingly after hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the order therein complained of, affirmed; and it was further ordered, that the appellant ſhould pay to the reſpondent thirty pounds for his coſts in reſpect of the ſaid appeal.

Order affirmed. Lords Journ. 22 vol. 281.

Michaelmas Term, 10 Geo. I.
November 11, A. D. 1723.

In the *Exchequer.*

Sir *Robert Eyre*, Lord Chief Baron:
Sir *Robert Price.*
Sir *Francis Page.*
Sir *Jefferey Gilbert.*

Sir *Robert Raymond*, Attorney-General.
Sir *Philip Yorke*, Solicitor-General.
Sir *William Thomſon*, Recorder of *London.*

Lloyd againſt *Mackworth.*

Decree againſt the one defendant, the other making default in a bill againſt two for tithes, with the whole coſts. *Bunb.* 138. pl. 214.

BILL for tithes againſt two; the defendants anſwer ſeparately; and there were ſeparate examinations; one defendant made default; and there was now a decree againſt the other, with the whole coſts; and the court would not diſtinguiſh, as to the coſts between the two defendants, but left *Mackworth* to get his contribution from the other, as he could; but note, this, as it ſeems, can only be, by bill.

November 21, A.D. 1723.

In the *Exchequer.*

Lambert againſt *Cumming.*

Exemption from tithes extends to a common appurtenant. *Bunb.* 138. pl. 215.

BILL for tithes in the pariſh of *Warton*, in the county of *Lancaſter*; the defendant inſiſts upon an exemption for his eſtate called *Hilderſton*; and for his

his right of common *without* number, in *Yealand*, which eſtate was parcel of the abbey of *Cokerſand*, one of the greater abbies; which exemption was proved; but it was objected for the plaintiff, that the common is only a *profit apprendre* out of other land, and an exemption cannot ariſe for an appendancy, or an appertenancy. *But by the court*, we will make no diſtinction between the common and the eſtate; and decreed for the defendant

November 25, A. D. 1723.

In the *Exchequer*.

Boys againſt *Ellis*.

IN a bill for tithes, a queſtion aroſe, whether there was fraud in tithing lambs, on this caſe: the ewes were kept by the defendant in the pariſh of *Driſfield*, in the county of *York*, (where the demand lay) all the year until *Chriſtmas*, when they were ready to drop their lambs, and then were removed into the pariſh of *Skern*, (where there was a ſmall *modus* only for lambs) and there kept till *Lady-day* for convenience of forage, as inſiſted upon by the defendant, and at *Lady-day* were brought back to *Driffield*. *Note*, there was no demand of tithe *pro rata*; and *quære*, if there had, if it could be decreed; for the tithe of lambs muſt be paid, where they fall, and is not a deviſible thing as wool is; *note*, the land in *Skern* was the defendant's own.

What removal of ewes ready to drop their lambs is fraudulent. *Bunb.* 139. pl. 217.

Tithe of lambs not diviſible as wool.

By the court. Here is not a ſufficient proof of fraud, and the plaintiff's bill was diſmiſſed.

But *Page* and *Gilbert*, barons, thought at firſt, it might be proper to ſend it to an iſſue, to try, whether fraud or not fraud; and whether this had been the uſual method of the defendant's courſe of huſbandry; but, afterwards, they concurred with Baron *Price*.

In the *Exchequer*.

The Biſhop of *London* and *Beaumont* againſt *Nicholls*.

Bill for tithes by the biſhop and ſequeſtrator, during the incapacity of the incumbent, diſmiſſed for want of making the incumbent or his committee a party. *Bunb.* 141. pl. 219.

BILL by the biſhop of *London* and *Beaumont*, as ſequeſtrator during the incapacity of mind of *Barefoot*, the preſent incumbent; for tithe-wood in the pariſh of *Birchanger* in the county of *Eſſex*; the defendant demurs; for that it does not appear, that either of the plaintiffs had any title; and it was inſiſted upon, by the counſel for the defendant, that (now, ſince the diviſion of pariſhes) the whole right to tithe was veſted in the rector, and the biſhop had nothing to do with the right, (even ſince the ſtatute of 28 *Hen.* VIII. chap. 1. which relates to a vacancy) but only to take care that the cure be ſupplied, and the profits ſequeſtered for that purpoſe; and the other plaintiff was only a ſequeſtrator, who, as it appears by the form of the ſequeſtration, and by his own ſhewing in the bill, was only an agent and collector; beſides, the incumbent *Barefoot* ſhould have been made a party; for poſſibly, at this time, he may have recovered his right ſenſes; and if he ſhould exhibit his bill, a recovery *now* could not be pleaded in bar of his demand. Baron *Price* was of opinion, that no decree could have been for the plaintiff, if it had been a ſequeſtration during a vacancy, nor can there be in this caſe; but *Page* and *Gilbert*, barons, were of opinion, the bill had been well enough, if *Barefoot* had been a party, either in perſon, or by his committee;

28 *Hen.* VIII. chap. 1.

and

and the bill was diſmiſſed, but without coſts, the want of parties not being expreſsly aſſigned, as cauſe of demurrer. And *note*, the words ("and for divers other cauſes, *&c.*") were not in the demurrer, as they ſhould have been.

See the caſes of *Perne* againſt *Oldfield*, under *Trinity* Term, 32 *Car.* II. *Banks* and *Rye*, under *Michaelmas* Term, 1 *Jac.* II. *Jones* againſt *Barret*, under *Hilary* Term, 10 *Geo.* I.

Hilary Term, 11 Geo. I.
A. D. 1724.

In the *Exchequer*.

Goule, Clerk, againſt *Jordon*, and others.

BILL by the vicar of *Eynſham*, in the county of *Oxford*, for ſix years tithe herbage and furze, of a cloſe, called *Amberry*, alias *Hanbourough Cloſe*, in the pariſh of *Eynſham*; the defendants inſiſted, that they did not know, that the vicar was intitled to theſe tithes, that they were informed no tithes thereof ought to be paid to the vicar; but that the great tithes, herbage, and furze, (if any was due) belonged to the impropriator; and then ſay, it was part of the diſſolved abbey of *Eynſham*, and exempted by ſtat. 31 *Hen.* VIII. chap. 13.

One inſtance within thirty years, of a compoſition with the vicar for agiſtment tithe of the cloſe wherein it was claimed, held ſufficient title in him to the ſmall tithes, on a bill by him for tithe herbage and furze. *Bunb.* 144. pl. 225.

31 *Hen.* VIII. chap. 13.

The plaintiff made out by his proof, that the vicar was intitled to all ſmall tithes within the pariſh, that the great tithes were conſtantly paid to the impropriator, and gave one inſtance within thirty years of a compoſition with the vicar for the agiſtment tithe of this cloſe.

The defendant's proof was negative, that they never know tithe paid for this close; and although it was objected, that a vicar should have made out a fuller title to the small tithes, yet the court were of opinion it was sufficient; and decreed the defendant to account.

A. D. 1724.

In the *Exchequer*.

——— *Beardmore* against *Gilbert*.

THIS was a bill brought by the impropriator, for the tithe of *Forley* and *Oakmore*, in the parish of *Alford*, in the county of *Stafford*; the defendant in his answer insists, that the ground, for which the tithe is demanded, is heath and barren ground, and exempted by stat. 2 and 3 *Edw.* VI. chap. 13. for seven years; but he admits by his answer, that it was wood ground, which had been grubbed up; and therefore the plaintiff's counsel insisted it had yielded profit before, and was not barren ground, within the meaning of the statute of 2 and 3 *Edw.* VI.

Wood ground grubbed up, is not exempted for seven years, as barren land, within the statute of 2 & 3 *Edw.* VI. ch. 13. *Bunb.* 159. pl. 229.

This came on upon bill and answer, and it appearing from the defendant's own admission, that it was wood ground grubbed up. *By the court*, the defendant was decreed to account.

A. D.

A. D. 1724.

In the *Exchequer.*

Bibye againſt *Huxley*

IN a bill for tithes of wood by the rector of *Whipmead*, in the county of *Bedford*, the queſtion was, whether birch was eſteemed timber in this county, which went to an iſſue to try.

Iſſue to try, whether beech eſteemed timber in the county of *Bedford*. *Bunb.* 192. pl. 269.

A. D. 1724.

In the *Exchequer.*

Boughton againſt *Wright.*

BILL by the rector of *Barrow* in the county of *Suffolk*, for the tithe of corn, *&c.* the defendant inſiſted, that he ſet out the tenth ſheaf of wheat and rye, and the tenth ſhock of barley, according to the cuſtom of the parish. The cuſtom he would have proved, was, that the defendant's cart was brought into the field, and he threw nine ſheaves into the cart, and left the tenth for the plaintiff.

Court would not let defendant prove the particular cuſtom, upon a general allegation in a bill for tithes of corn, wheat, rye, and barley; and thought, that *nine* ſheaves ought to be ſet out on the ground, and the *tenth* left out, marked with a green bough. *Bunb.* 186, pl. 262.

The queſtion was, whether this cuſtomary method of tithing the corn was good; for it was inſiſted upon, on behalf of the plaintiff, that nine ſheaves ought to be ſet out on the ground, and the tenth left out, and marked with a green bough for the plaintiff; and that they ought not to bring the cart in the field, and

and throw the nine ſheaves into the cart, before the whole ten are ſet out; for the plaintiff ought to be able to view and judge, whether he has a fair and juſt tenth part.

And the court would not let the defendant in to prove the particular cuſtom, upon this general allegation; ſo he was decreed to account; for they thought the whole *ten* ought firſt to be ſet out, before the *nine* are thrown into the cart.

A. D. 1724.

In the *Exchequer*.

Downes againſt *Mooreman*, and *Mooreman* againſt *Downes*.

Portion of tithes diſtinct from tithes thereof to a rectory. Bunb. 189. pl. 206.

BILL by the rector of *Bonchurch* in the *Iſle of White*, in the county of *Southampton*, for the great and ſmall tithe of a farm, called *Luccomb Farm*, in the defendant's poſſeſſion.

The defendant inſiſts that *Lovecomb* alias *Luccomb Farm*, formerly belonged to the abbey of *Quarrer*, that the abbot of *Quarrer* was ſeiſed in fee of the manor and farm of, &c. and all the tithes renewing thereon, *as of a portion of tithes in groſs*; that this abbey, by ſurrender, and by ſtat. 27 *Hen.* VIII. chap. 28. came to the crown; that after King *Henry*'s demiſe, the ſame deſcended to King *Edward* the *Sixth*, who, in the ſeventh year of his reign, by his letters patent granted "*the manor of* Lovecomb *and* Grange, *&c. and all and all manner of tithes, &c.*

27 *Hen.* VIII. chap. 28.

in

in the ſaid manor of Lovecomb, *&c. parcel of the revenues of the ſaid late abbey of* Quarrer," to *Cotton* and others, and ſo derives the title down to *Knight*, to whom the defendant was leſſor for twenty-one years; and in his anſwer he ſet forth the clauſe in ſtat. 27 *Hen.* VIII. chap. 28. ſect. 2. "That all perſons, &c. who ſhould have by any letters patents, any lands, &c. tithes, &c. belonging to any monaſtery, &c. diſſolved by that ſtatute, ſhould hold the ſame, in like form, manner, and condition, as the abbots, &c. held the ſame, and might have held the ſame, if the ſaid abbies had not been ſuppreſſed."

This cauſe was heard *February* 11, A. D. 1724, and the defendant carried his proof down, from the year 1289, in a regular method, to the hands of the defendant's leſſors *the knights*; but *note*, all the written evidence produced mentioned the tithe only "*all and all manner of tithes*," &c. but in none of the inſtruments was mention made of a *portion* of tithes, upon which the plaintiff founded his objection, that no title appeared in the defendant; *portion of tithes* being a thing diſtinct from tithes in the general acceptation; *note*, there were never any tithes in kind paid.

By the whole court. But the proof being ſo clear, the plaintiff's bill was diſmiſſed, and the party had a decree on his croſs bill to enjoy his tithes purſuant to his grants, &c.

A copy of an agreement between the abbot of *Quarrer* and the monks of *Lyra* was produced in evidence; to which it was objected for the plaintiff, Copy of agreement between the abbot of *Quarrer* and monks of *Lyra*, contrary to the

admitted to be read upon the particular circumſtances of the caſe, though general rules of evidence.

that

that by the rules of evidence, it could not be read, being neither a record nor a public thing; but the defendant produced a copy of the ſtatute of *Oxford*, that no book, *&c.* ſhould go out of the *Bodleian* library; and the court gave him leave to read this copy of agreement in evidence, though they admitted it not to be within the general rules of evidence, upon the very particular circumſtances of this caſe.

Bodleian library.

A. D. 1724.

In the *Exchequer*.

Jones againſt *Barrett*.

Court ſeemed to think the biſhop ſhould be a party to bill againſt ſequeſtrator, during the vacancy of a church. *Bunb.* 192. pl. 268.

BILL by the vicar of *Weſt Dean*, in the county of *Suſſex*, againſt the defendant, who was ſequeſtrator, for an account of the profits received during the vacancy; it was objected for the defendant, that the biſhop ought to have been made a party, ſince the ſequeſtrator is accountable to him for what he receives by ſtatute of 18 *Hen.* VIII. *chap.* 1.

28 *Hen.* III. *cap.* 1.

The court *ſeemed* to think the biſhop *ſhould have* been a party; but by conſent this cauſe was referred to the biſhop of the dioceſe.

See the caſes of *Perne* againſt *Oldfield*, under *Trinity* Term, 32 *Car.* II. *Banks* and *Rye*, under *Michaelmas* Term, 1 *Jac.* II. Biſhop of *London* and *Beaumount* againſt *Nicholls*, under *Michaelmas* Term, 9 *Geo.* I.

Eaſter

Eaſter Term, 11 Geo. I.

April 7, A. D. 1724.

In the *Exchequer.*

Finch, clerk, againſt *Maiſters* and others.

BILL by the rector of *Winwick*, in the county of *Lancaſter*, for tithe graſs, cut and made into hay; one defendant inſiſts, that he, and all thoſe, *&c.* in an ancient meſſuage called *Newhalls*, and the demeſne lands thereunto belonging, containing ſixty-eight acres, two roods, and eighteen perches, in *Aſhton*, within the ſaid pariſh; have immemorially paid a *modus* of a penny at *Eaſter* annually, in lieu of the tithe hay, growing on the premiſſes.

Modus of one penny for hay, and of twenty-ſix ſhillings and eight-pence for hay and ſmall tithes allowed. *Bunb.* 161. pl. 238.

Another defendant inſiſted upon a *modus* of twenty-ſix ſhillings and eight-pence for hay, ſmall tithes, and *Eaſter* offerings, for an ancient tenement, called *Brynn* and *Garſwood*; containing ſix hundred and twenty-five acres.

It was objected for the plaintiff, that it appearing by the proof in the cauſe, that this payment was for hay, (as a ſmall tithe) therefore hay made from graſs being in it's nature a great tithe, it muſt be intended that this hay penny was for ſomething elſe; and the ancient import of the word hay or haw, was an hedge, or ſome ſmall incloſure belonging to an houſe; it was alſo objected to this and the other *moduſes*, that they were uncertain, could not be ſuppoſed to have a reaſonable commencement; and, thirdly, were liable to fraud; for if all the land was turned into meadow, it would pay but one penny: but notwithſtanding theſe objections, both theſe *moduſes* were allowed *by the court.*

Trinity

Trinity Term, 11 Geo. I.

June 11, A. D. 1724.

In the *Exchequer*.

Gumley againſt *Burt*.

Bill for hops and peaſe, no endowment being produced, or uſage proved, diſmiſſed as to them. Bunb. 270. pl. 289.

BILL by the plaintiff, as leſſee of the vicar of *Thiſtleworth*, for tithes of peas and beans, *ſet and ſowed in rows, drilled, hoed, and hand-weeded in a garden like manner*, againſt the leſſee of the impropriator (the Dean and Chapter of *Windſor*) as being a ſmall tithe; the defendant inſiſts, that a great part of the pariſh is converted into this method of cultivation, and that this tithe was never paid to the vicar, but always to the impropriator.

The caſes of *Stephens* againſt *Martin*, [which ſee under *Hilary* Term, 7 *Wil.* III.] and of *Nicholas* againſt *Elliot*, [which ſee under *Hilary* Term, 10 *Ann.* and 3 Geo. I.] were quoted by the counſel for the plaintiff. The counſel for the defendant anſwered, that it did not appear in the *firſt* caſe, that the impropriator conteſted the matter, nor what the endowment was, and that as to the ſecond, there was a proof of uſage by the vicar for forty or fifty years, receiving tithe peas and beans, where plow and ſpade were uſed; but where the plow only was uſed, the impropriator received them.

And *by the court*; there being no endowment produced, nor uſage proved in the preſent caſe, the bill was diſmiſſed, as to the demand of peaſe and beans.

In the *Exchequer*.

June 15, A. D. 1724.

Philips againſt *Symes, and others.*

and

Symes and others, againſt *Phillips.*

BILL by the rector of *Stoke Abbots* in the county of *Dorſet* (amongſt other things) for the tithe of furze, coppice, and underwood, milk, calves, wool, and fruit, *&c.* of gardens.

Modus for furze, coppice and underwood decreed. *Bunb.* 172. pl. 244.

The defendants inſiſt,

1. That no tithe of furze ought to be, or ever was paid, *unleſs it was ſold.*

2. Nor any tithe of coppice, or underwood, if cattle were depaſtured, where the wood grew.

See the caſe of *Roe* and others againſt the biſhop of *Exeter*, under *Hilary* Term, 5 *Geo.* 1.

3. They inſiſt upon a garden penny, for the produce of the garden

Garden penny allowed.

4. Upon a *modus* of eight-pence for every cow, and four-pence for every heifer, in lieu of the tithe of milk, and calves of ſuch cow and heifer.

Eight-pence for a cow, and four-pence for an heifer, adjudged good.

5. That three ſhillings and four-pence was payable for every ſcore of ſheep, ſhorn out of the pariſh, and ſo proportionably for a leſs number than twenty, or for a leſs time than a year, for the wool and lamb of ſuch ſheep.

Note,

Note, The defendants omitted in their anſwer to ſpecify the day whereupon the ſaid reſpective *moduſes* were payable; and therefore, to ſupply that defect, they exhibited their croſs bill to eſtabliſh theſe *moduſes*, and alledged the ſame to be payable at *Eaſter*.

Upon hearing both theſe cauſes together, it was decreed *by the court*,

1. That the defendants ought to account for furze, coppice, and underwood; for the defence, as to theſe, amounts, in effect, only to a *non decimando*.

2. That although the plaintiff in the original cauſe had a right to a decree for tithe *in kind*, becauſe the defendants had omitted the day *on* which the *moduſes* were payable, yet now that defect was ſupplied by their croſs-bill, both cauſes being now as but one; and it would introduce great inconſiſtency in the decree, if the *moduſes* ſhould, for that reaſon, be adjudged void in the original cauſe, and eſtabliſhed in the croſs cauſe, provided they are good in other reſpects.

See the caſes of *Mountague* againſt ——— under *Eaſter* Term, 1 *Geo.* II. and of *Gibb* againſt *Goodman*, under *Trinity* Term, 6 *Geo.* II.

3. The garden penny was allowed.

4. The eight-pence for a cow, and four-pence for an heifer, were adjudged good; though it was objected, that it was not good for the milk and *calf*, for then it would be payable, although there was no calf; to which it was anſwered, that then the four-pence and eight-pence would be payable, for

for it was payable for all the tithe a cow, *&c.* produces, which is only milk and calf.

5. To the three ſhillings and four pence, for every ſcore of ſheep ſhorn out of the pariſh, and ſo proportionably for a leſs number than twenty, or for a leſs time than a year, for the wool and lamb of ſuch ſheep, it was objected,

1. That this is too rank.

2. It is payable for wool *and lamb*, though the lambs might be fallen before the ſheep were removed, and the tithe of lamb would be payable before.

3. There is great uncertainty, becauſe of the fractions which might ariſe, when a ſmall number were only removed.

4. It is liable to fraud, for the pariſhioner might remove them out of the pariſh a little way only, juſt before ſhearing time, and then bring them back again.

See the caſe of *Chapman* and the Biſhop of *Lincoln*, under *Hilary* Term, 3 *Geo.* II.

To the above objections it was anſwered by the court;

1. We * cannot take notice of this, nor enter into the conſideration thereof.

2. It is payable at *Eaſter*, and is a ſatisfaction for all the wool and lamb, and lamb before that time.

3. The ſame objection might be made to ariſe from the fraction, where only a ſmall quantity of wool was, and tithe in kind paid.

* But the reporter aſks why not? *Bunb.* 273.

4. If fraud appeared, as it would be taken to be, under the circumſtances put in the objection, then the pariſhioners ſhould pay tithe in kind, as well as if they had continued in the pariſh, to which the *modus* does not extend.

[*See this part of the caſe under Hilary* Term, 11 *Geo.* I.]

So the defendants were decreed to account in the original cauſe for tithe of the furze and wood; but the bill was diſmiſſed as to the reſt, and the other *moduſes* were eſtabliſhed on the croſs cauſe.

June 18, A. D. 1724.

In the *Exchequer.*

Lawrence againſt *Jones.*

Eaſter offerings are due of common right, and are a compenſation for perſonal tithes. *Bunb.* 173. pl. 245.

BILL by the vicar of *Brackwarth* in the county of *Glouceſter*, for tithes; it was decreed *by the whole court*, that *Eaſter* offerings were due of common right, at two-pence an head, unleſs it had been cuſtomary to pay more; that the vicar ought to have a decree accordingly, though there was *no proof* of *Eaſter* offerings ever having been paid, (there being a lay impropriator, who is not intitled to offerings, but he only who exerciſes a ſpiritual function) [but *quære* this ſays the *reporter* himſelf] And it was ſaid by Baron *Gilbert*, that offerings were a compenſation for perſonal tithes.

Not impropriator but parſon only *ſeems* intitled to ſuch offerings.

See the caſe of *Egerton* again. *Still*, under *Trinity* Term, 11 *Geo.* I.

In

June 18, A. D. 1724.

In the *Exchequer.*

Harriſon againſt *Sharp* and *Hurſt.*

BILL by the plaintiff, as vicar of *Grantham*, in the county of *Lincoln*, who, therein, demanded tithes of the vill of *Harrowby*; the defendants inſiſted on this *modus*, *viz.* that when any of the incloſed paſtures in *Harrowby* were plowed and ſown with corn or grain, of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the vicar; but when eaten and depaſtured with ſheep and cattle, then the occupier paid to the vicar one ſhilling in the pound of the yearly rent or value thereof, and no more, upon ſome day after *Michaelmas*, yearly, in lieu and ſatisfaction of all tithes whatſoever: *By the opinion of the whole court*, this *modus* was adjudged void upon the authority of the caſe of *Startupp* and *Dodderidge*; and therefore gave no opinion on the uncertainty of the day.

Modus of one ſhilling in the pound of the yearly rent of the land, void. *Bunb.* 174. pl. 246.

Startupp and *Dodderidge.* 2 *Salk.* 657. pl. 11. *Mod.* Rep. 60.

See the caſes of *Behn* againſt *Lee* under *Trinity* Term, 11 *Anne*. *Benſon* againſt *Watkins*, under *Hilary* Term, 2 *Geo.* I. *Smith* againſt *Roocliffe*, under *Hilary* Term, 3 *Geo.* I.

June 25, A. D. 1724.

In the *Exchequer*.

Sir *Edward Blacket* againſt Doctor *Finney*.

Injunction to the ſpiritual court to ſtay a libel for tithes in kind, where a *modus* of four-pence a ſcore of all ſheep in lieu of tithe of lamb and wool, is prayed to be eſtabliſhed. *Bunb.* 176. pl. 249.

BILL ſuggeſted, that there was a *modus* of four-pence a ſcore of all ſheep going on *Gayerfield*, in the pariſh of *Ryton*, in the county of *Durham*, in lieu of tithe of lamb and wool; that the defendant libelled in the ſpiritual court for tithes in kind; that the plaintiff moved for a prohibition in the court of Pleas in *Durham*, but permitted a conſultation to go, and depended on relief in this court, and prayed to have the *modus* eſtabliſhed.

The defendant, doctor *Finney*, inſiſted, there was no ſuch *modus*, but that the four-pence was in lieu of the milk of the ewes, which was uſual in that country.

Now, upon motion for an injunction to the ſpiritual court, the defendant's counſel inſiſted, that this was proper matter of ſuggeſtion on a prohibition; and alſo the defendant had in the anſwer denied the *modus*.

But *by the court*, there being ſome diſpute between the parties, whether the *modus* is as alledged in the bill, and as the ſpiritual court cannot * *try* the *modus*, we will grant the injunction.

See the caſe of *Salmon* againſt *Rake*, under *Trinity* Term, 6 *Geo.* II.

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* No more can a court of *equity*; *quære* therefore if you ſhould not read, "cannot *direct an iſſue* to try the *modus*." The editor.

Michael-

Michaelmas Term, 11 Geo. I.

October 26, A. D. 1724.

In the *Exchequer*.

Woodnoth againſt Lord *Cobham*, and *Gibbs* his tenant.

A Lay impropriator prefers his bill for great tithe of the pariſh of *Thornbrough*, in the county of *Buckingham*; the defendant inſiſted, that there was a payment of ſixteen ſhillings and four-pence to the vicar, in lieu of the tithes of the chantry paſtures, (which were in demand) and to prove this, produced accounts of one *Edward Chaplin*, who was ſteward to the defendant's father, wherein there were entries of this payment; but it was objected for the plaintiff, that though a parſon's or a vicar's book (where it appeared that payments were made) were good evidence, yet never admitted in the caſe of him who has the fee.

Entries by the lord's ſteward admitted to be read in evidence, to prove a *modus* to the vicar in diſcharge againſt the parſon. *Bunb.* 180. pl. 253. See S. P. decreed in *Bunb.* 46. pl. 75. Anon.

But *by the court*, (Baron *Price diſſenting*) even old rent rolls (where it appears payments have been made) are good evidence; and they ordered theſe entries to be read.

Old rent rolls evidence.

But *note*, by Baron *Gilbert*, they ought to be read, becauſe no better evidence can be had; but if *Edward Chaplin* had been alive, they ought not.

In this caſe it ſeemed to be the opinion of the court, that the payment of a *modus* to the vicar is good evidence of an exemption, againſt the parſon.

Payment of *modus* to vicar ſeems evidence of an exemption, againſt the parſon.

A. D. 1724.

In *Chancery*.

Sir *Peter King*, Lord Keeper.
Sir *Joſeph Jekyll*, Maſter of the Rolls.

Smithſon and others againſt *Dodſon*.

Tithes of hay ought to be paid in graſs cocks. 9 *Mod. Rep.* 117, 118.

THIS was a bill brought by the pariſhioners of *Gargrave*, in *Yorkſhire*, againſt the defendant their vicar, to produce an ancient terrier in his cuſtody, which ſhews the method of payment of tithes in that pariſh, which they ſuggeſt to be a *modus*, *viz.* for hay the vicar is to have the tenth graſs cock, and three halfpence for every milch cow, and a penny for every ſwarm of bees, and ſixpence for every orchard; and the bill prays, that the court would direct an iſſue or trial at law, to ſettle this *modus*, and ſets forth, that the predeceſſor of the defendant, did, about thirty years ſince, alter the payment of this *modus*, and combined at that time with his clerk, to raiſe the fees for burials, *&c.* which fees had been paid ever ſince.

Terrier.

The defendant admits there was a *modus* ſome years ſince, for payment of tithes in this pariſh, and that he hath a terrier in his cuſtody of all the tithes payable to the vicar, and that he had been very much harraſſed at law, when he was willing to take the tithes, according to the terrier in his cuſtody, ſo as he might have them peaceably; and as to the fees for burials, marriages, chriſtnings, and churching of women, he inſiſts, that the ſame ſhould be paid as uſual; for that they were not proper for a *modus*, becauſe there is no canon to aſcertain what ſhall be paid,

Fees for burials, marriages, chriſtnings, churching of women.

paid, if the ſums now paid ſhould be diſcharged; but it is not ſo in other caſes, for if a *modus* ſhould be deſtroyed, then tithes in kind muſt be paid; therefore, as to that matter, the bill is improper, and ought to be diſmiſſed; ſince the court hath nothing before them to aſcertain the meaſure of ſuch fees, and the defendant is in no fault, but by continuing the payment of the fees, as he found them paid before he was vicar.

The court held, that the tithe hay muſt, and ought to be paid in graſs cocks; and as to the tithes of cows, bees, and orchards, the parties did not differ in the manner of payment, but only in the ſurplice fees for burials, *&c.* Therefore it was ordered, that they ſhould attend a maſter, to ſettle how far they differ in that matter; and the conſideration of coſts ſhould be reſerved, till the maſter makes his report; but as to that part of the plaintiff's demands, which the defendant did not controvert, nor inſiſt any thing to the contrary, the pariſhioners were ordered to pay coſts.

Surplice fees.

Where the pariſhioners ſhall pay coſts.

November 15, A. D. 1724.

In *Chancery.*

Webber againſt *Taylor.*

BILL was brought to eſtabliſh a *modus*, which was laid thus, For payment of ſuch a ſum of money; but if in the hands of any perſon, to pay tithe in kind, or the money, at the election of the parſon.

Modus to pay a ſum of money, but if in another perſon's hands: money or tithe in kind, ill. *Sel.* Caſ. in Chanc. 32.

Modus not to be eſtabliſhed without trial, if deſired.

Lord Chancellor. I will never eſtabliſh a *modus* againſt the parſon without a trial at law, if he deſires it; but this *modus* is clearly ill; for a *modus* cannot be deſultory.

November 23, A. D. 1724.

In the *Exchequer*.

Bate againſt *Hodges*.

Cauſe reheard. *Bunb.* 115. pl. 196.

THIS cauſe being now reheard before *Eyres*, Chief Baron, and *Price*, *Page*, and *Gilbert*, Barons, the decree was reverſed, *Gilbert* doubting.

Note; After this, upon a new bill, and croſs bill, the ſeveral objections to the manner of laying the *modus* were cured, and it was allowed to be good at laſt.

See this caſe under *Hilary Term*, 8 *Geo.* I. *Burwell* againſt *Coates*, under *Eaſter* Term, 9 *Geo.* I.

December 8, A. D. 1724.

In the *Exchequer*.

Chapman againſt *Barlow*.

Head lands not tithable *Bunb.* 183. pl. 280.

BILL by the rector of *Radnage*, in the county of *Buckingham*, for the tithe of head lands, of a mill and cherries.

The defendant inſiſts the head lands were only large enough to turn the plough upon, and as to this, the bill was diſmiſſed.

As

As to the mill, no tithes thereof having ever been paid, and being an ancient mill, it was adjourned, to conſider, whether the tithe of a water corn mill was a prædial or perſonal tithe.

Whether tithe of a water corn mill is a prædial or perſonal tithe.

See the caſe of *Anſel* againſt *Adman*, under *Trinity* Term, 6 *Will.* and *Mary*.

As to the black cherries, the defendant inſiſted they grew wild in hedges, and waſte places, and ſerved for fencing his grounds; but the defendant was decreed to pay the tithe of theſe cherries.

Tithe of black cherries decreed.

See *Nevate* and *Chamberlain*, under *Hilary* Term, 3 *Anne*. *Chamberlain* and *Nevate* under *Hilary* Term, 4 *Anne*.

Hilary Term, 11 Geo. I.

February 3, A. D. 1725.

In the *Exchequer*.

Philips againſt *Symes* and others, and *Symes* and others againſt *Philips*.

THIS cauſe came on to be reheard, and principally as to the *modus* of three ſhillings and four pence for every ſcore of ſheep, ſhorn out of the pariſh, &c. and upon inſpection of the croſs bill, the payment was alledged to be at *Eaſter*, *or otherwiſe when the ſheep ſhall be ſold*, which being uncertain, this *modus* was adjudged void *by the whole court*.

Modus of three ſhillings and four pence payable at *Eaſter, or otherwiſe when the ſheep ſhall be ſold*, for a ſcore of them ſhorn out of the pariſh is void, as *uncertain* in point of time for the payment thereof. *Bunb.* 173.

See theſe caſes under *Trinity* Term, 10 *Geo.* I.

Hilary

Hilary Term, 11 * Geo. I.

Feb. † 3. A. D. 1725.

In the *Exchequer.*

Mills againſt *Etheridge.*

* Lord Chief Baron *Comyns* cites this caſe, as heard and determined in 12 *Geo.* I. *Com. Rep.* 392. pl 194.

† 5 *February. Ibid.*

Plea of non-reſidence, to a bill for tithes, by leſſee of a rectory, allowed. *Bunb.* 210. pl. 287.

BILL by the leſſee of *Matthew Hawes*, clerk, (ſetting forth his leaſe dated *February* 4, 1723,) for the tithes, *&c.* for 1724, and 1725, in the *pariſh* of *Simpſon* in the county of *Buckingham.*

The defendant, as to the diſcovery of the quantity of lands he held, and what tithes he had in thoſe years, and alſo as to the account, pleads, that it appears by the plaintiff's bill, that his leaſe was dated *February* 4, 1723, then pleads the ſtatute of

23 *Eliz.* c. 20. 13 *Eliz. chap.* 20. touching leaſes of benefices, and other eccleſiaſtical livings with cure, and avers, that *Matthew Hawes* clerk, the leſſor, was abſent from his benefice eighty days *and more*, in one year ſince the leaſe, and before the filing of the bill, *viz.*, in 1724, that the church of *Simpſon* is not impropriate, and that it is a benefice or eccleſiaſtical promotion with cure, and therefore by ſuch non-reſidence, and by virtue of the ſaid act, the leaſe was abſolutely void.

Now upon arguing this plea (which was drawn by the *reporter*) baron *Price* was for over-ruling the plea, becauſe it covered the diſcovery, which, according to the uſage of the court, a plaintiff was intitled to, whatever exemption or diſcharge a defendant might have; (and at the time of drawing the plea the *reporter* was of that opinion, and ſo informed his

his client) but the Lord Chief Baron denied it to be law, and with *Page* and *Hale*, was of opinion, that the plea was good, extending even to diſcovery, becauſe it amounted to an abſolute incapacity in the plaintiff, which differed from the caſes, where the plaintiff was intitled, of common right; and there is no neceſſity to aver that the abſence was voluntary, (for if it was otherwiſe, it lay upon the plaintiff to ſhew it) or to aver, that the abſence was eighty days together; ſo the plea was allowed.

See the caſes of *Bokenham* againſt *Bentfield*. *Atkinſon* againſt *Peaſley*, both under *Michaelmas* Term, 12 *Geo.* I. *Quilter* and *Lowndes*; *Quilter* and *Muſſendine*, both under *Eaſter* Term, 12 *Geo.* I.

February 11, A. D. 1725.

In the *Exchequer*.

Geale, clerk, againſt *Wyntour*.

Plea of a decree in *Chancery*, and a verdict at law to eſtabliſh *moduſes* to a bill for tithes allowed. *Bunb.* 212. pl. 288.

BILL for tithes as vicar of *Biſhop's Lyddiatt*, in the county of *Somerſet*, ſets forth a former bill in this court, in the year 1717, and a decree in 1718, for thoſe tithes, after iſſues to try *moduſes*, and verdicts for the plaintiff.

The defendant pleads, that in *Trinity* Term, 1721, his bill in the court of *Chancery* to eſtabliſh the *moduſes*, &c. that iſſues were directed and found for the *moduſes*, and decreed thereupon to be eſtabliſhed, and pleads the ſame verdicts and decree in bar of the plaintiff's now demand; and the plea was allowed *by the whole court*. Baron *Price*, being now of

of the ſame opinion in all, as he was in the caſes of *Quilter* and *Lowndes*, and of *Quilter* and *Muſſendine*, both which ſee under *Trinity* Term, 12 *Geo.* I. But *note*, no counſel appeared for the plaintiff, and ſo upon the authority of the above cited caſes, and of *Bokenham* againſt *Bentfield*, [which ſee under *Michaelmas* Term, 12 *Geo.* I.] the plea was allowed.

Trinity Term 11 Geo. I.

June 7, A. D. 1725.

In the *Exchequer*.

Sir *Jeoffery Gilbert*, Lord Chief Baron.
Sir *Robert Price*.
Sir *Francis Page*.
Sir *Barnard Hale*.

Sir *Philip Yorke*, Attorney General.
Sir *Clement Wearg*, Solicitor General.
Sir *William Thomſon*, Recorder of *London*.

Egerton, clerk, againſt *Still*.

IT was decreed *by the court*, in this cauſe,

Eaſter offerings due of common right. *Bunb.* 198. pl. 275.

1. That plaintiff ſhould have *Eaſter* offerings, as due of common right, altho' he demanded them as due by cuſtom.

See the caſe of *Lawrence* againſt *Jones*, under *Trinity* Term, 10 *Geo.* I.

2. That

2. That where there are above ten calves, lambs, pigs, &c the tithe of the odd number above ten ſhall be paid, according to the value; and not to be carried over to the next year.

Odd number above ten calves, lambs, pigs, &c. to be tithed according to their value.

June 10, A. D. 1725.

In the *Exchequer*.

Sir *Edward Blacket*, Baronet, againſt Doctor *Finney*.

BILL to eſtabliſh a *modus* of four-pence a ſcore of ſheep in the lieu of the tithe of lamb and wool payable, or which ought to be paid on or about the 25th of *April*, yearly.

Modus payable *on or about*, bad as to *time*, for the *uncertainty*. *Bunb.* 198. pl. 276.

It was objected at the hearing, to the uncertainty of the time of payment; and the court allowed the objection, but gave the plaintiff liberty to amend, upon paying the coſts of the day.

Reſter

Eaſter Term, 12 Geo. I.

A. D. 1726.

In the *Exchequer*.

Sir *Jeffery Gilbert*, Lord Chief Baron,
Sir *Robert Price*,
Sir *Francis Page*,

only:

Sir *Philip Yorke*, Attorney-General,
Charles Talbot, Solicitor General,
Sir *William Thomſon*, Recorder of *London*,

Coleman impropriator of *Thompſon in Norfolk*, plaintiff, againſt *Barker*, defendant.

Tithes for depaſturing of ſheep on turnips, &c. Gilb. Eq. Rep. 231.

THE plaintiff by his bill demanded tithes for the depaſturing of ſheep on turnips, remaining on the ground unſevered.

The defendant ſaid the ſheep paid tithes of wool, and that tithes ought not to be paid twice.

It appeared, that after ſhearing time the defendant fed his ſheep with turnips, whereby they were bettered five ſhillings a ſheep; that they went about five months on the turnips, and then were ſold to the butcher; and the defendant brought in a like quantity of new ſheep before ſhearing-time came again, ſo that the plaintiff always had tithe of wool of the full number.

Pengelly for the plaintiff ſaid, this improvement of the ſheep, by the turnips, was a new increaſe, and that

that conſequently, tithes ought to be paid for the improvement and increaſe; and if the turnips had been ſevered, there had been no doubt, but tithes had been due; he cited three caſes which he relied on.

Firſt, The caſe of *Nicholas* and *Hooper*, 1 *Rol. Abr. Diſm.* 462. *pl.* 7. where it is adjudged, that if a man pays tithes of lambs, and two months after ſhears the other nine parts, he ſhall pay tithe-wool, although he had before paid tithe of the lambs; for, ſays the book, it is a new increaſe.

Secondly, The ſecond caſe which he quoted was *Eaſtmond* againſt *Sandys* [which ſee under *Eaſter* Term, 8 *Will.* III.] a demand for tithe-herbage of oxen, which were depaſtured to be fatted.

The defendant inſiſted, that theſe oxen had been uſed for the plough, and ſo were exempted; that their labour improve the parſon's tithes, and ſo to pay tithe for their agiſtment would be double tithing: but the court of *Exchequer* decreed, and it was affirmed in the Houſe of Lords, that tithe-herbage was due for the time they were taken from the plough, they being then no otherwiſe beneficial to the parſon in tithes.

Thirdly, The caſe moſt relied on was a decree in this court, *Hill.* 1 *W. & M. Dummer* and *Wingfield*, which was a demand of tithe for paſturage of ſheep, from the time of ſhearing till they were ſold. The defendant inſiſted that by the ſheep's depaſturing on the land it was improved, and the plaintiff's tithes bettered thereby: but the court decreed an account, and ſaid this was no bar to the plaintiff's demand: and this decree, upon rehearing, was affirmed.

Ward

Ward and *Bunbury* for the defendant argued, that if this demand prevailed, it would be double tithing, which was contrary to the whole tenor of the law, and cited many cases for that purpose; but *the court* agreed, that it was a new increase, that they could not distinguish it from the case of *Dummer* and *Wingfield*, that the distinctons laid down in the case of *Eastmond* and *Sandys* were good, and decreed, that the defendant should go to an account.

A. D. 1726.

In the *Exchequer*.

Cuthbert against *Westwood* and others.

What payments in lieu of tithes are good, &c. Gilb. Eq. Rep. 230.

BILL against land-owners to establish a right of 40 *l. per ann.* and in lieu of tithes: which by a decree in time of *Car.* 1. was to be paid out of particular lands (which were formerly part of the forest of *Braden*) to the vicar of *Churchlade* in *Wiltshire*.

No tithes originally due of forest land.

Two objections were taken for want of parties. First, that these land-owners were tenants to the crown, of lands lying within the bounds of the forest (which formerly paid no tithes) and that so the Attorney General ought to have been made a party.

Answer. It does not appear by the bill that they are lessees under the crown, and the defendants have not insisted upon it in their answers, and so that is out of the case.

Second objection. It is not not sufficient to make the land-owners only, but they should have made the occupiers, parties to the bill; for a decree against the land-owners could not affect them.

Answered

Anſwered by *Bunbury*, That it would be endleſs to make all the occupiers parties, and if that was neceſſary to be done, the plaintiff could never come at his right; for there were great numbers of them, and any ſingle one dying, would put the plaintiff to his bill of revivor, and cited the caſe of *Briſco* againſt the undertakers of the land-bank, before Lord-keeper *Wright*, who ſaid he would not oblige them to bring all before the court, ſince the right might be determined by having a view; which *the court* thought reaſonable.

The court, Though we can decree only againſt the land-owners who are before the court, yet that will affect the lands; the 40 *l.* a year ought to be apportioned among the owners, and the original decree may be carried againſt the occupiers land.

Decree a commiſſion ſhould go to inquire into and aſcertain the value of the lands, the owner and occupiers names, and what proportion of the 40 *l. per ann.* each tenement ought to pay.

A. D. 1726.

In the *Exchequer*.

Quilter againſt *Muſſendine*.

A Bill was for a diſcovery of tithes by leſſee of a parſon. The defendant pleads 13 *Eliz. c.* 20. againſt non-reſidence in bar, *Ward*, for the plaintiff, objected to the plea.

Non-reſidence pleaded in bar to a bill for tithes. *Gilb.* Eq. Rep. 228. 13 *El.* c. 20.

Firſt, that it was bad in ſubſtance, for that it did not ſhew, that he was not of neceſſity, or juſtifiably abſent (barely ſaying he was voluntarily abſent not being ſufficient) as he might have done, according to *Butler* and *Godall*'s caſe. 6 *Co.* 21. b.

Secondly, the time of abſence the ſtatute requires to avoid the leaſe is 80 days and more, which ought to appear to be a continual abſence for 80 days altogether, and at one time. 1 *Bulſtrode* 3. *Shepard* verſus *Townſhe*, *Moore* 436.

Thirdly, Though the plea ſhould be thought good in ſubſtance, yet it could be no bar to the diſcovery, though it might as to the relief; to prove which he mentioned the caſe of a *modus* pleaded in bar to a bill for tithes, in which caſe it was held, that although the plea was good as to the relief, yet it was no bar as to the diſcovery: but that the defendant muſt anſwer, and ſhew the quantity, quality, and value of the tithes; and the reaſon upon which that has been ſo reſolved is, becauſe if the defendant's plea in bar ſhould prove to be falſe, the plaintiff then is to have a diſcovery from the defendant upon oath, and they won't let him run the hazard of loſing ſuch diſcovery, which he might do if the defendant ſhould die in the mean time, and that in *Hilary* Term laſt, the court would not allow a plea of the ſtatute of limitation to be a good bar to a bill for tithes.

Fourthly, *Edlin* objected that they had ſet out the year wrong in the plea, and that it did not appear, that he was abſent above 80 days in any one year, taking the year to commence according to the computation of æra upon the 25th *March*, as he inſiſted it might. *Bunbury* and *Bootle* for the defendant, to what had been ſaid, gave the following anſwer.

As to the firſt objection, that if he had any good excuſe for his abſence, it being a thing lying intirely within his own cognizance, they need not take notice of it, but he muſt ſhew it in his replication, and the whole court held the ſame.

Secondly,

Secondly, The conſtruction they contend for would intirely defeat the ſtatute, for at that rate he need only be there five days in the whole year; as to the opinion in *Bulſtrode*, it is only that of two judges *obiter*; and as to *Moor* 436. the *inſimul ac pariter* are in the ſpecial verdict, but no notice taken of it, that it was neceſſary they ſhould be in.

Thirdly, They diſtinguiſhed this from a plea of a *modus*, for that admits the plaintiff's title to the tithes, but only avoids the payment of them in kind; for that by cuſtom he was to have ſomething elſe in lieu of them: in that caſe the demand is allowed to be juſt; and the only queſtion is, in what manner that demand is to be ſatisfied? But the plea in the preſent caſe denies and defeats all the plaintiff's right and title to the tithes, and to any manner of ſatisfaction for them. The plea of the ſtatute of limitation was alſo very different from this, for that ſtatute could not be extended to a demand for tithes.

Fourthly, That the year was to be 365 days, without reckoning it from the 25th *March*; and they inſiſted upon the caſe of *Etheridge* and *Mills* [which ſee under *Hilary* Term, 11 *Geo.* I.] in this court, being in point.

Gilbert Chief Baron. The caſe of *Etheridge* and *Mills* cannot be diſtinguiſhed from this.

Secondly, The caſe of *Bulſtrode* is not law; for that would defeat the ſtatute *cauſa quo ſupra.*

Thirdly, That this was a good plea in bar, both as to the diſcovery and relief. As to the caſe of pleading a *modus*, that allows the plaintiff's title, and ſo that is pleading againſt what you allowed before.

Statute of limitations.

The reaſon why the ſtatute of limitations was not allowed to be pleaded in bar to a bill for tithes was, that the tithes were not of the nature of thoſe demands that are intended to be barred by the ſtatute; beſides, that plea allows the title; years ſhall not refer to the æra, but muſt be intended a ſolar year of 365 days.

Price Baron agreed the year ſhall be 365 days, and the abſence any 80 days within that compaſs.

As to the ſecond objection, how inconvenient it might be to allow ſuch plea a good bar as to the diſcovery, for that ſuppoſing the plea to be falſe, if the defendant ſhould die, the plaintiff might loſe the benefit of a diſcovery, the anſwer was very plain; for the defendant having here ſhewed that the plaintiff has no title to the tithes themſelves, he in conſequence can have no title to a diſcovery concerning them.

Page Baron. The plea of a *modus* is an acknowledgement of the title of the plaintiff, and is in part a diſcovery itſelf; for it ſets out he is to pay ſo much for corn, ſo much for pigs, &c. and then it is nothing ſtrange he ſhould be compelled to go on a little farther, and ſhew the quantity and number of his corn, pigs, &c.

He took the diſtinction to be between a plea acknowledging the title, and one that abſolutely denies it. If a bill be brought by an heir, claiming by deſcent againſt another, ſuggeſting ſome fraud, and praying a diſcovery, there, if the defendant pleads he is a purchaſor for the valuable conſideration, ſuch plea, which goes to the plaintiff's title, is always good, both as to relief and diſcovery; ſo in caſe

caſe of a bill for an account againſt one as bailiff, ſuggeſting fraud, if the defendant pleads, that at ſuch a time he did account, he need not go on and ſet out an account. And he alſo agreed as to the computation of the year.

Hale Baron. That the plea is a good bar to the diſcovery, and that the caſe of a *modus* had been rightly diſtinguiſhed from this.

As to the ſtatute of limitations, he thought it might have been pleaded in bar to the diſcovery, if it could have been pleaded at all, which it could not; for that ſpecialties are not barred by the ſtatute, and tithes are of a higher nature.

And he farther ſaid, that no conſtruction would be too liberal to make parſons reſide, and take care of their pariſhes.

See the caſes of *Lloyd* againſt *Green*, under *Eaſter* Term, 7 *Anne*. *Mills* againſt *Etheridge*, under *Hilary* Term, 11 *Geo.* I. *Quilter* and *Muſſendine*, under the next Term. *Quilter* againſt *Lowndes*, under *Trinity* Term, 12 and alſo 13 *Geo.* I. *Bekenham* againſt *Bentfield*, and *Atkinſon* againſt *Peaſley*, both under *Michaelmas* Term, 13 *Geo.* I.

Trinity Term, 12 Geo. I.

May 20, A. D. 1726.

In the *Exchequer.*

Quilter againſt *Lowndes.*

Quilter againſt *Muſſendine.*

Plea of verdict and decree in bar of demand for tithes, allowed. *Bunb.* 211. n.

THE plea of the ſtatute of 13 *Eliz.* chap. 20. touching leaſes of benefices, and other eccleſiaſtical livings with cure, came on, and now was allowed by *the whole court.*

See theſe caſes in the laſt caſe.

Hilary Term, 12 Geo. I.

February 3, A. D. 1726-7.

In the *Exchequer.*

The caſe of *Fiſher* and others, Leſſees of the Dean and Chapter of *Chriſt Church* in *Oxford.*

The dean and chapter is a ſpiritual, and not a lay body. *Bunb.* 209. pl. 285.

THIS caſe ſtood for the judgment of the court, this day, when it was expected, that the long controverted queſtion, whether a conſtant non-payment of tithes is evidence of an exemption againſt

against a lay impropriator, would have been * decided; but the court gave judgment on the words of the patents, mentioned in the cause, though they determined that the Dean and Chapter is a spiritual, and not a lay body.

Easter Term, 13 Geo. I.

A. D. 1727.

In the *Exchequer*.

Hanson against *Fielding*.

A Bill was brought by a lay impropriator claiming under a grant from the crown, after the diſſolution of the religious houſes, for tithes within the pariſh and boundaries of *Shilton* and *Barnacle*, in the county of *Warwick*, the tithes of corn, grain, wool, and lamb, for the year 1723. Defendant, as to the tithe for wool and lamb, ſays he is leſſee of the vicar of *Anſtis*, and that the ſmall tithes did not belong to the mother church, but were received by the chaplain of *Anſtis* long before the diſſolution of religious houſes, and that after they came into the hands of the crown, they were alſo enjoyed diſtinctly; as to the tithes of corn and grain within

Of exemption from tithes as being parcel of the poſſeſſions of the priors of *St. John* of *Jeruſalem*. *Gilb.* Eq. Rep. 225. *Bunb.* 214. pl. 291.

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* But it has ſince been ſolemnly determined, that the preſumption ariſing from a conſtant non-payment would not be ſufficient evidence of an exemption, even againſt a lay impropriator, unleſs the defendant could ſhew, either that the lands were parcel of one of the greater abbies, or that ſome of the impropriators had releaſed the tithes See the caſe of the corporation of *Bury* againſt *Evans*, under *Eaſter* Term, 12 *Geo.* II.

the manor of *Barnacle*, he says, that the lands were formerly part of the possessions of the hospitallers of *St. John of Jerusalem*, and that his lands were discharged from the payment of tithes, while they continued in his own manurance and occupation; that his lands by virtue of some acts of parliament (27 *Hen.* VIII. chap. 21. 31 *Hen.* VIII. chap. 13. 32 *Hen.* VIII. chap. 24.) were vested in the crown, and were to be held and enjoyed by the king and his grantees, in as large and ample manner, as the late religious houses held them; that he was a grantee under the crown, and consequently intitled to hold them, discharged from tithes.

27 *Hen.* VIII. chap. 21.
31 *Hen.* VIII. chap. 13.
32 *Hen.* VIII. chap. 24.

Mr. *Bunbury*, for the defendant, objected, that the lands of the hospitallers of *St. John of Jerusalem*, coming to the crown, by the statute 32 *Hen.* VIII. chap. 24. they could not claim the privilege of the clause of exemption, in the statute 31 *Hen.* VIII. chap. 13. by which it is appointed, that all monasteries, abbies, *&c.* which before had come, or hereafter should come to the king by suppression, surrender, *&c.* should be held and enjoyed by him, in as large and ample manner, as the religious houses held them; and whereas many of them were discharged from tithes, they should be held by the king and his grantees discharged, *&c.* and cited 2 *Co.* 47. *a.* Archbishop of *Canterbury*'s case, where it was resolved, that the clause of discharge should extend only to those possessions, which came to the king by the said act; and that it would be absurd, that the breach of the act 31 *Hen.* VIII. should extend to a future act of parliament, which the makers of the said statute 31 *Hen.* VIII. without the spirit of prophecy, could not have fore-knowledge of, and insisted strongly upon the case of *Cornwallis* and *Sparling*,

Bunb. 214.

Cro. Jac. 57. *Moor* 913. *Dogg.* 346. no unleſs expreſs authority in point.

Serjeant *Pengelly*, for the defendant, made uſe of two ways to take off the objection; firſt, that part of the land of the hoſpitallers of *St. John* of *Jeruſalem*, were veſted in the crown, by the 31 *Hen.* VIII. and that the 32 *Hen.* VIII. was only made, becauſe of the great compaſs of their eſtates (ſome of which were in *Ireland*) and to be ſo general, as to comprehend all that might be omitted in 31 *Hen.* VIII. and then without doubt the branch of the act concerning diſcharge from tithes, extends to them. But if the court ſhould think theſe lands paſſed only by the 32 *Hen.* VIII. he thought, ſecondly, that even upon that ſtatute, the grantee ſhould hold them diſcharged from tithes; and ſeeing it had been reſolved by ſome judges, that the clauſe of exemption in the 31 *Hen.* VIII. ſhould not extend to latter ſtatutes (though at firſt that was a doubt upon the words "*or hereafter* "*ſhall come*") he would therefore wave that, and rely upon the 31 *Hen.* VIII. by which they were veſted in the crown, with all privileges, *&c.* Now one of their privileges was, that they ſhould hold the lands diſcharged from tithes, whilſt they continued in their occupations, which being continued to the crown, by the ſaid ſtatute 31 *Hen.* VIII. we ſay is a real diſcharge annexed to the land, and going along with it, and it has been accordingly expreſsly granted to us; for we have a grant dated the 15th *December* 4 *Ed.* VI. of this manor of *Barnacle*, *&c.* with the very ſame words, as are in the ſtatute, *viz. with all privileges*, *&c.*" and we have enjoyed it ever ſince, with benefit of this exemption; and cited *T. Raym.* 225. *Foſſet* and *Franklin*, where it is ſaid by *Hale* Chief

Chief Juſtice, that by reaſon of the word "*privileges*," they ſhall not pay tithes, and reſolved accordingly by the court.

Serjeant *Cumins* ſenior, and Mr. *Ward* ſenior, on the ſame ſide, cited *Dy.* 227. b. pl. 60. *W. Jon.* 182. *Bridg.* 32. *Lat.* 89. and *per Ward* in *Trin.* Term 1687. the caſe of *Daniel*, vicar of *Benge*, in *Hertfordſhire*, and Sir *John Gower*, where, upon conſidering all the caſes, this court held all the lands diſcharged, and diſmiſſed the bill. Bunb. 214.

Mr. *Bunbury* ſaid in reply, that, in the caſe in *Dyer*, the lands came to the crown by 31 *Henry* VIII. and then they were immediately exempt, as, *Bridg.* 32. *Lat.* 89. *W. Jon.* 182. As the caſe appears, the court was equally divided upon the point of diſcharge. As to *T. Raym.* 225. it was a very ſhort report, and does not appear upon what reaſons the court went. The great ſtreſs is laid upon the word "*privileges*" in the ſtatute 31 *Henry* VIII. and if that of itſelf had been ſufficient, for what reaſon did they inſert a particular clauſe of exemption from tithes? they inſiſted upon the caſe of *Cornwallis* and *Spurling*, which being determined upon a ſpecial verdict, the book alſo taking notice, that the like judgment was given upon a demurrer, is of great authority.

Gilbert Chief Baron. Thoſe privileges were granted to this eccleſiaſtical corporation, by bulls from the Pope; but theſe diſcharges, for want of a ſpecial clauſe to continue them, were extinguiſhed, in as many of them as were diſſolved by the 27 *Henry* VIII. but that cramping the king in his alienation, in 31 *Henry* VIII. they put a clauſe to continue to the crown

crown the privileges that were in them as ſpecial corporations. Now the queſtion is, whether the word "*privileges*" in 31 *Henry* VIII. has the ſmalleſt intent to carry all other *privileges* to the crown. If the point had not been reſolved, we ſhould not have diſputed it.

Nota; It was no further ſettled, for when the plaintiff went into his proof of the grants of the tithes of theſe lands they appeared to be grants of different poſſeſſions, therefore his bill was diſmiſſed, in that he failed, in making out his title. *Bunb.* 214.

May 11, A. D. 1727.

In the *Exchequer*.

Maxſton againſt *Cleypole* and others,

BILL by a lay impropriator for tithes, for about twenty-four years.

The ſtatute of limitations, 21 *Jac.* I. chap. 16. not pleadable to a bill for tithes. *Bunb.* 213. pl. 290.

The defendant, as to ſuch part of the bill as prays diſcovery and relief, for any time before, within ſix years next before the filing the bill, or ſerving the *ſubpœna*, pleads the ſtatute of limitations, and that he did not promiſe to make any ſatisfaction for any tithes, before the ſaid ſix years.

This plea was now argued, and overruled *by the whole court*; for the defendant, as to the tithes, is in nature of *receiver*, or bailiff, for the plaintiff, in which caſe the ſtatute of limitation does not operate.

See the caſes of *Lloyd* againſt *Green*, under *Eaſter* Term, 5 *Anne*. *Quilter* and *Muſſendine*, under *Trinity* Term, 12 *Geo.* I.

Trinity

Trinity Term, 13 Geo. I.

May 20, A. D. 1727.

In the *Exchequer.*

Quilter and *Lowndes.*

Plea of verdict and decree in bar of demand for tithes, allowed. *Bunb.* 212, 214

DEFENDANT pleads that he preferred his bill in the court of *Chancery* to eſtabliſh the *modus*, &c. that iſſues were directed and found for the *moduſes*, and decreed thereupon to be eſtabliſhed, and pleads the ſame verdict and decree in bar of the plaintiff's now demand; and the plea was allowed by the whole court.

See the caſes of *Bokenham* againſt *Bentfield*, under *Michaelmas* Term, 13 *Geo.* I. *Quilter* and *Muſſenline*, under *Trinity* Term, 12 *Geo.* I.

Michaelmas Term, 13 Geo. I.
A. D. 1727.

In the *Exchequer*.

Sir *Thomas Pengelly*, Lord Chief Baron.
Sir *Francis Page*, *till November* 3.
Sir *Bernard Hale*.
Sir *Lawrence Carter*.
Sir *John Comyns*.

Sir *Philip Yorke*, Attorney General.
Charles Talbot, Solicitor General.
Sir *William Thomſon*, Recorder of London.

November 15, A. D. 1727.

In the *Exchequer*.

Bokenham againſt *Bentfield*.

Plea of decree and verdict to a bill for tithes allowed. Bunb. 234. S.

PLEA of a decree in *Chancery* and verdict at law in eſtabliſhment of *modus* to a bill in this court for tithes allowed in bar of the plaintiff's now demand.

See the caſes of *Quilter* againſt *Maſſingberd*, under *Eaſter* and *Trinity* Terms, 12 *Geo.* I. and *Quilter* againſt *Lowndes*, under *Trinity* Terms, 12 and alſo 13 *Geo.* I.

December

December 16, A. D. 1727.

In the *Exchequer*.

Atkinſon and *Prodgers* againſt *Peaſley*.

Plea to a bill for tithes, that rector was abſent eighty days, over ruled. *Bunb.* 211. a.

PLEA to a bill for tithes, from *Michaelmas* 1723, to *Michaelmas* 1724, that the rector was abſent eighty days, *viz.* in 1724, which might be after the time wherein the tithes were demanded in the bill; and for this reaſon it was over ruled.

Non-reſidence, forfeiture of leaſe and rent only; not of tithes.

Quære, if this a good plea, if rector and leſſee join, for by non-reſidence *before ſentence*, he only forfeits his leaſe and rent, *not his* tithes.

See the caſes of *Mills* againſt *Etheridge*, under *Hilary* Term, 11 *Geo.* I. *Quilter* againſt *Muſſendine*, under *Eaſter* and *Trinity* Terms, 12 *Geo.* I. *Quilter* againſt *Lowndes*, under *Trinity* Terms, 12 and 13 *Geo.* I. and the next caſe.

In the *Exchequer*.

Bokenham and *Bentfield*.

Leaſe of parſon void for non-reſidence, when pleaded to a bill brought by leſſee for tithes. *Com. Rep.* 392. pl. 194.

BILL by leſſee of the parſon of for tithes, againſt defendant a pariſhioner; to which defendant pleaded ſtat. 13 *Eliz.* chap. 20. by which it is enacted "that no leaſe of any benefice or eccleſiaſtical promotion with cure, or any part thereof, ſhall endure any longer than while the leſſor ſhall be ordinarily reſident, and ſerving the cure of ſuch benefice without abſence above fourſcore days in any one year, but that ſuch leaſe, immediately upon ſuch abſence, ſhall ceaſe and be void," &c. and that the leſſor was abſent above fourſcore days in ſuch year, whereby

whereby his leaſe to the plaintiff did become void; and the plea being admitted to be heard according to the rules of court, no one then appeared to defend or maintain the title of the plaintiff, for it was ſaid by the counſel for the defendant, that ſuch plea was formerly allowed, *viz.* between *Mills* * and *Etheridge*, *February* 5, *Hilary* Term, 12 *Geo.* I.

* Which ſee, under *Hilary* Term, 11 *Geo.* I.

That it was alſo allowed in *Eaſter* Term, between *Quilter* and *Muſſendine*, [which ſee under *Eaſter* and *Trinity* Terms, 12 *Geo.* I.] and between *Quilter* and *Lowndes* [which ſee under *Trinity* Terms, 12 and 13 *Geo.* I.] that the ſole queſtion in thoſe caſes was, if the defendant ſhould not anſwer to the quantities and values alledged by the bill, at the ſame time he tenders his plea; ſo as where the defendant inſiſts on a *modus* as a diſcharge of his payment of tithes in *kind*, yet the defendant ought to anſwer to the quantity and value of the tithes charged in the bill; otherwiſe if it were afterwards found there was no ſuch *modus* plaintiff cannot have a decree againſt defendant, becauſe it does not appear how much is due by him for his tithes, to the plaintiff.

But it was then reſolved by the court, that upon ſuch plea of non-reſidence of the leſſor, the defendant need not anſwer to the quantities and values, for ſuch plea goes to the right and title of the plaintiff; but where *modus* is alledged, that admits the title of the plaintiff, to take tithes of the defendant, and only goes to the manner of payment, if tithes ſhould be paid in *kind* or not.

And upon all theſe authorities alledged, the plea, in the preſent caſe, was allowed.

See the caſe of *Atkinſon* and *Prodgers* againſt *Peaſley*, under this term.

Trinity

Trinity Term, 1 Geo. II.

July 3, A. D. 1727.

In the *Exchequer*.

At the Sittings in *Serjeant's-Inn Hall*, in *Fleet-Street*.

Sir *Thomas Pengelly*, Lord Chief Baron.
Sir *Bernard Hale*.
Sir *Lawrence Carter*.
Sir *John Comyns*.

Sir *Philip Yorke*, Attorney General.
Charles Talbot, Solicitor General.
Sir *William Thomſon*, Recorder of London.

William Gwavas, Gentleman — Plaintiff.

William Kelynack, *Richard Richards*, *Philip Kelynack*, and one hundred and ſixteen others, pariſhioners and fiſhermen, in the pariſh of *Paul*, in the county of *Cornwall*. — Defendants.

Bill directed, *nihil Tantæ* Baron *Hale*, on a bill for the tithe of fiſh, payable by cuſtom, to the impropriator, though the defendants gave no evidence againſt the cuſtom, and though a former decree in the cauſe had been acquieſced in for many years. 3 *Brown*. 479. pl. 69. *Rud.* 239. pl. 311. *Id.* 256. pl. 332.

A BILL for the tithe of fiſh, was preferred by the plaintiff, as owner of the impropriate rectory of the pariſh of *Paul*, *alias Pauli*, *alias Paulin*, in the county of *Cornwall*, which is an ancient rectory adjoining to the ſea, and extending into *Mount's* Bay, and hath time immemorial been a fiſhing town; and within the ſaid rectory and pariſh, there is, and time

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out of mind hath been uſed and approved the following cuſtom, and which was inſiſted upon, *viz.* that every pariſhioner of the ſaid pariſh, being proprietor or occupier of any fiſhing boat, fiſhing net, or other fiſhing craft, which has been uſually tried, moored, or kept, within any part of the rectory or pariſh, (when not uſed in fiſhing) ought to pay to the impropriate rector the tenth part of all great and ſmall fiſh, taken in the bay, *or adjoining ſeas*, with ſuch boats, nets, or fiſhing craft, (except fiſh uſed for bait for fiſhing, and fiſh meaſhed in the ſleeves of nets, called * *ſaynes*); and the plaintiff ſets forth in his bill a decree obtained by his † *grand-father*, againſt about one hundred and thirty pariſhioners, which was made upon a very ſolemn ‡ hearing, and thereby the cuſtom, as now alledged (except as to the exception of fiſh meaſhed in the ſleeves) was eſtabliſhed.

The plaintiff alſo inſiſted, that, a year after the decree, one hundred and thirty of the then defendants, by indorſement on the decree, acknowledged the cuſtom.

And from the time of this decree tithes were paid, agreeable to the cuſtom, to the plaintiff's *father*, during his life, and after his death, to the plaintiff's mother, who held the rectory, as her jointure, and from the time of her death, to the plaintiff himſelf, until the year 1722, when ſome of the fiſhermen refuſed to pay their tithes of pilchards and herrings 3 *Brown.* 482.

* See this caſe, under *Trinity* Term, 32 *Car.* II. *ante*, p. 63. a.

† *Father*, ſee below, and 3 *Brown.* 482.

‡ See this caſe, under *Trinity* Term, 32 *Car.* II. *ante*, 62. a.

caught in drift nets, and their example being ſoon followed by many others, the plaintiff, in *Hilary* Term 1724, exhibited his bill in the court of *Exchequer* againſt the defendants (two of whom, *viz. John Tregurtha* and *John James*, were defendants in the former cauſe) for a diſcovery and ſatisfaction of the tithes of pilchards and herrings caught by the defendants ſince the 25th of *March* 1722 in *Mount's* Bay, and at or near St. *Ives Fowey*, *Mevagiſſey*, and other fiſhing places, in the ſeas adjoining, by and with fiſh craft kept within the ſaid rectory, as aforeſaid; the bill charges the cuſtom to be as above ſtated, and to have been eſtabliſhed by the former decree, and that the defendants had ſo taken within that time great quantities of pilchards and herrings, but refuſed to pay tithes thereof, pretending that there was no ſuch cuſtom, eſpecially near St. *Ives Fawey*, *&c.* or other remote fiſhing places, or in driving nets.

The defendants put in their ſeveral anſwers to this bill, and although, by the laſt of ſuch anſwers, they ſaid they had paid all their tithe fiſh to the plaintiff or his agents, up to the 29th of *September* 1724, yet by the firſt anſwer they denied, that they knew or believed that there was ſuch a cuſtom as aforeſaid, of paying tithe, and inſiſted, that ſuch cuſtom was unreaſonable, and from which they hoped to be relieved, for that the defendants had no land in the ſaid rectory whereon to moor their boats, and they were forced to pay others for ſuch liberty, and alſo port farm to the Duke of *Cornwall*, and were at great charges for boats and nets, which would not laſt above four years, whereas *ſoynes*, being uſed near the ſhore, would laſt a man's age, and that the tenth fiſh was

ſometimes

ſometimes half, and at other times the whole profit; they alſo inſiſted,

1. That the former decree was not binding on them, there being only two of the preſent defendants, *viz. John Tregurtha, and John James*, who were defendants in the former cauſe; and they ſaid, that they conceived that decree to be hard, and therefore not binding on them. *Bunb.* 257. 3 *Brown*, 482.

2. That the cuſtom did not extend to driving* nets, which of late years had been moſtly uſed, and *ſaynes* neglected.

3. That it was unreaſonable, to extend to inhabitants † *and others*, and into *adjoining ſeas*, out of the pariſh, and therefore prayed an iſſue.

But the plaintiff's counſel inſiſted, that here was ſufficient foundation for a decree, without ſending it to an iſſue,

1. The former decree being ſo ſolemnly obtained.

2. The indorſement by one hundred and thirty of the then defendants, two of whom were now living, and defendants to this bill.

3. Conſtant uſage and acquieſcence ſince, until the year 1722. See 3 *Brown*, 483.

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* See *ante*, p. 63. n.

† See *ante*, p. 62. n.

3 *Brown.* 483. Iſſue being joined, ſeveral witneſſes were examined on both ſides, and on the 3d of *July*, 1727, the cauſe was heard, and though there ſeemed to be no evidence, by the defendants, againſt the cuſtom, and though the plaintiff had the former decree ſigned by above one hundred and thirty pariſhioners, teſtifying their acquieſcence in the decree, yet directions were given for trying the cuſtom, and the court ſent the plaintiff to an iſſue at law, *reluctante* Baron * *Hale*, at the next aſſizes, for the ſaid county; and in the mean time, the defendants were, by *conſent*, to pay their tithes as uſual, of late years, before the ſuit began, without prejudice.

Bunb. 239. pl. 321.

3 *Brown.* 483.

See this caſe under *Trinity* Term, 32 *Car.* II. *Michaelmas* Term, 2 *Geo.* II. *Ex parte Gwavas*, under *Eaſter* Term, 2 *Geo.* II. and the caſe of Earl *Scarborough* againſt *Hunter*, under *Eaſter* Term, 6 *Geo.* I.

Hilary Term, 1 Geo. II.

February 24. A. D. 1727-8.

In the *Exchequer.*

Berney againſt *Chambers.*

Anſwer amended by increaſing the number of acres, after iſſue joined, upon payment of coſts, reſwearing anſwer, and taking out a new commiſſion, at party's own expence, *but very unuſual.* *Bunb.* 248, 321.

LEAVE was given to amend an anſwer to a tithe bill, wherein the defendant had ſworn, that ſuch a cloſe contained nine acres, and to make it

* See the caſe *Ex parte Gwavas*, under *Eaſter* Term, 2 *Geo.* II.

ſeventeen,

ſeventeen, though iſſue was joined, and a commiſſion had iſſued (which the reporter never knew done before) but it was upon the defendant's paying all the coſts ſince the anſwer, ſwearing the anſwer over again, and taking out a new commiſſion at his own expence.

See the next caſe, and *Gibb* againſt *Goodman*, under *Trinity* Term, 6 *Geo.* II.

Eaſter Term, 1 Geo. II.

A. D. 1728.

In the *Exchequer*.

Wortley Mountague againſt ——

THE court refuſed to let the defendant amend his anſwer, by only altering the day of payment of a *modus*, although iſſue was not joined, and the day ſet right in the croſs bill.

Anſwer cannot be amended by altering day of payment of a *modus*, though iſſue not joined, and day right in croſs-bill. *Bunb.* 248. a.

See the caſe *Gibb* againſt *Goodman*, under *Trinity* Term, 6 *Geo.* II. *Berney* againſt *Chambers*, under *Hilary* Term, 1 *Geo.* II.

Hilary Term, 2 Geo. II.

February 28, A. D. 1728-9.

In the *Exchequer.*

At *Serjeant's Inn.*

Stone againſt *Rideout*, and others.

No tithe having been paid for 120 years, bill for them by impropriator under a grant of *Jac.* I. diſmiſſed. *Bunb.* 262. pl. 340.

BILL brought by a lay impropriator for tithe hay in the pariſh of *Framfield*, in the county of *Suſſex*, and derives title under a grant of 3 *Jac.* 1. which expreſsly grants the tithes of hay.

To this bill the vicar was made a party, and the plaintiff had no proof that he, or thoſe under whom he claimed, ever had received tithe hay; the defendants (pariſhioners) inſiſted he was only intitled to corn and grain, and that the vicar was intitled to tithe hay; though there was no evidence, that tithe hay had ever been paid, either to the impropriator or vicar, but the farms of the defendants were under ancient *moduſes* or cuſtomary payments, and the defendants inſiſted, that the hay was covered under the *moduſes*, and to corroborate this gave ſeveral inſtances of payments of *moduſes* to the vicar, by ſeveral pariſhioners, who had nothing but meadow ground, and conſequently could pay only for the tithe of hay.

This cauſe was this day heard, and though there was no proof of payment of tithe hay in kind to the vicar, but only preſumed to be ſo, by the *moduſes*; yet ſince there was no inſtance of the impropriator's having received tithe of hay for one hundred and twenty years, ſince the grant of *Jac.* I. the bill was diſmiſſed *by the whole court.*

See

See *Medly* againſt *Talmy*, under *Trinity* Term, 7 *Wil.* III. *Thorngate* againſt *Wallop*, under *that* Term, 11 *Wil.* III.

Eaſter Term, 2 Geo. II.

May 9, A. D. 1729.

In the *Exchequer.*

Ex parte William Gwavas.

THE petitioner prayed for rehearing of the cauſe of *Gwavas* againſt *Kelynac*, which was heard laſt *Trinity* Term; becauſe the cuſtom, as ſet forth by his bill, was allowed and confirmed by the decree in his father's cauſe, which appeared to have been made on very ſolemn and mature debate, and to have been acquieſced in above 47 years; ſo that it was become very difficult to ſhew by living witneſſes, what the cuſtom was, previous to that decree: and alſo, becauſe it appeared through the whole ſeries of depoſitions on both ſides in this cauſe, that there was not the leaſt colour or doubt, but that the tithes of pilchards and herrings caught in the codds of *ſeynes*, or the tenth penny of what the ſame had been ſold for, had been continually paid; and that the only doubt, if any, was about the tithe of fiſh taken in the driſt nets, which was a matter fully ſettled by the former decree.

The cuſtom ſet forth in this cauſe under *Trinity* term, 32 *Car.* II. and 1 *Geo.* II. relating to the tithe of fiſh, was found by the jury, on a trial at bar, to the ſatisfaction of all the court, but Baron *Carter*. 3 *Brown* 483. *Bunb.* 256. pl. 332.

On 9th of *May*, 1729, the cauſe was reheard.

Bunb. 257, 258. The Lord Chief Baron, and *Comyns* baron, ſeemed to think this a ſufficient ground, to decree for the plaintiff, (Q. *Hale** baron) doubting; and upon great importunity of the defendant's counſel, who ſtill in-

3 Brown, 483. ſiſted to try the cuſtom at law, the court directed an iſſue, and that a trial ſhould be had, at the bar of the ſaid court, by a ſpecial jury of the county of *Middleſex*, to try, whether there was ſuch a cuſtom, as was laid, and inſiſted upon, in the bill, or not;

Bunb. 258. which iſſues came on to be tried at *Weſtminſter*, in the court of *Exchequer*, on 6th *November* following,

3 Brown, 483. *viz.* 1729, whereupon ſeveral aged witneſſes, brought from *Cornwall*, were examined on the ſaid trial,

Bunb. 258. which laſted 14 hours, and after a long defence made by the defendants, the jury gave their verdict for the plaintiff, though the defendants gave pretty ſtrong evidence, that drift † nets were as ancient as *ſaynes*, and no tithes had ever been paid for drift fiſh; but the authority of the decree (when the matter was fully conſidered) and an acquieſcence for forty-one years ſince, was too ſtrong to be got over, and the verdict was to the ſatisfaction of all the

3 Brown 483. court, (but Baron *Carter*) which found that there was ſuch a cuſtom as aforeſaid.

See this caſe under *Trinity* Term, 32 *Car.* 2. 1 *Geo.* II. *Michaelmas* Term, 2 *Geo.* II. and upon appeal *February* 26, A. D. 1729. and alſo the caſe of Earl *Scarborough* againſt *Hunter*, under *Eaſter* Term, 6 *Geo.* I.

* See this caſe under *Trinity* Term, 1 Geo. II. † See *ante*, 63. n.

Trinity

Trinity Term, 2 & 3 Geo. II.

A. D. 1729.

In *Chancery*.

Peter, Lord *King*, Lord Chancellor,
Sir *Joſeph Jekyll*, Maſter of the Rolls.

Carleton againſt *Brightwell*.

A *modus* for tithe of corn, for the inhabitants of ſuch a tenement, and the lands therewith uſually enjoyed, void in the opinion of his honour the Maſter of the Rolls for uncertainty, in regard the tenements may be uninhabited, and the lands afterwards ſhifted, and let with other farms. 2 *Peer Wil.* 462. pl. 146.

IN a bill for tithes, in kind, the defendant inſiſted upon ſeveral *moduſes*, one of which was, that the inhabitants of ſuch a tenement, with the lands uſually enjoyed therewith, had been accuſtomed to pay ſuch a *modus* for tithe-corn.

Court: This is quite uncertain; the houſe may fall down, or be uninhabited, and then no *modus* will be payable; alſo, nothing can be more uncertain, than lands uſually enjoyed with the tenement, ſince the lands let with a farm-houſe may probably be often ſhifted.

Turkies tithe-able, but if tithes are paid of eggs, then none to be paid for chickens.

Partridges.

2. Tithes being demanded of turkies, it was objected in *Moor* 599, (*Hugton* verſus *Prince*,) it was ſaid, that turkies were things *feræ naturæ*, and not titheable any more than partridges, and that turkies were not brought hither from beyond ſea, before queen *Elizabeth*'s time.

Court. I can not ſee, but that turkies are birds as tame as hens or other poultry, and therefore muſt pay tithes; it is true, if tithes be once paid of eggs, there can be no demand made a ſecond time, in reſpect of the chickens hatched afterwards.

3. There

3. There was another demand made by the bill of the tithe of corn mills, and it was inſiſted that every tenth toll diſh was due. 1 *Show.* Rep. 281. *Gumble* verſus *Falkingham*, *Carth.* 215.

Mills are tithe-able, but they are to pay only a perſonal tithe of the clear gains, after all manner of charges deducted.

* See the caſe under *Hilary* term, 5 *Anne.*

But it was replied, that this matter was determined in the caſe of * *Chamberlaine* againſt *Newte*, in the Houſe of Lords, upon an appeal from a decree of the court of *Exchequer*, where the bill was brought for the tithe of a malt mill, in *Tiverton* in *Devonſhire* and where the Lords determined, with the aſſiſtance of eight judges (whereof *Holt* C. J. was one) that mills were titheable, but that the ſame was a perſonal tithe, and ſo ought to be paid, out of the clear gain, after all manner of charges and expences deducted; upon which authority the *Maſter of the* Rolls decreed the mill in queſtion to pay tithes, but that they ſhould be paid only as a perſonal tithe.

In a bill for tithes in the *Exchequer* the court never decrees payment of tithes for the future, but *Chancery* does.

Note: In this caſe it was ſaid and admitted, that in a bill brought by a parſon for tithes, though the right thereto be ever ſo plain, yet in the *Exchequer* the decree is not, that the defendant ſhall pay tithes for the future, but that he ſhall account for and pay what tithe is due to the time of bringing the bill, but in the court of *Chancery*, it is to the time of the † decree.

† *Quære* if this be the eſtabliſhed practice of the court of *Chancery*, or done only of late years, in ſome few inſtances. *The Reporter.*

Michaelmas

Michaelmas Term, 3 Geo. II.

December 5, A. D. 1729.

In the *Exchequer*.

William Gwavas, Plaintiff

William Kelynack, *Richard Richards*, *Philip Kelynack*, and one hundred and sixteen others, parishioners and fishermen in the parish of *Paul*, in the county of *Cornwall*, } Defendants.

ON the above day this cause was heard upon the equity reserved, when the court declared that the custom was good at law, and decreed that the same should be established; and that according to such custom the defendants should account for the value of the tithe, or the tenth part of pilchards and herrings by them taken since the 25th of *March*, 1722, to the time of exhibiting the bill; and that the plaintiff should have his costs both at law and in equity, to be taxed by the deputy remembrancer.

The custom set forth in this cause under *Trinity* Term, 32 *Car.* II. and 1 *Geo.* II relating to the tithe of fish, was established by the court of *Exchequer*, upon the hearing on the equity reserved, and after the cause had been heard on appeal in the House of Lords. 3 *Brown.* 483.

See the cases of *Gwavas* against *Kelynack*, under *Trinity* Term, 32 *Car.* II. and 1 *Geo.* II. *Michaelmas* Term, 2 *Geo.* II. and the case of the Earl of *Scarborough* against *Hunter*, under *Easter* Term, 6 *Geo.* I.

Trinity

Trinity Term, 3 Geo. II.
June 20, A. D. 1729.

In the *Exchequer*.

The Biſhop of *Hereford* againſt the Duke of *Bridgwater*.

Motion to inſpect books of defendant's manor, to ſee what proportion of tithes was paid, denied. *Bunb.* 269. pl. 346.

DOCTOR *Egerton*, Biſhop of *Hereford*, who had preferred a bill for tithes, againſt his brother the Duke of *Bridgwater*, and ſeveral tenants of his manor, moved to have an inſpection of the court rolls of the manor, to ſee what proportions they paid of a *modus* inſiſted on; but denied by the whole court.

Michaelmas Term, 3 Geo. II.
November 13, A. D. 1729.

In the *Exchequer*.

Price, Clerk, againſt *Pratt*, and others.

Curate, though made perpetual, being removeable at pleaſure, cannot ſue for tithes. *Bunb.* 273. pl. 351.

THE plaintiff preferred his bill, as perpetual curate of *Berrington*, being a chapel annexed to the church of *Hemel Hempſtead*, in the county of *Hertford*, againſt the defendants inhabitants and occupiers of lands within the ſaid chapelry; he made his title under a nomination to his curacy, in the year 1716, by *Cornelius Price*, then vicar of *Hemel Hempſtead*, who alſo gave him, by the ſame inſtrument, the ſmall tithes in *Berington*, with power to ſue for them in his (the vicar's) name; and he alſo

ſet

ſet forth a licence to preach from the then biſhop of *Lincoln*; and alſo that *Topping* (*Price*'s ſucceſſor) in *June* 1722 granted him a new nomination to this curacy, expreſsly for life, with like power to ſue for the ſmall tithes in both their names; but though he took a ſecond nomination, yet that by the firſt, and the biſhop's licence, he was ſufficiently intitled to the tithes, becauſe by ſuch nomination he became perpetual curate.

But *by the court*, (Lord Chief Baron *Pengelly*, and Baron *Carter* only in court) the bill muſt be diſmiſſed, for no title appears in the plaintiff; for though a curate is appointed by a vicar, either generally, or expreſsly for life, yet ſuch appointment is, in its own nature, revocable by law, even without any cauſe aſſigned, and by the eccleſiaſtical law upon cauſe ſhewn; ſo that the plaintiff had not ſuch a permanent intereſt as to claim any tithes

Nota; By Baron *Carter*, if a biſhop grants ſuch a licence to a curate to preach, and after is tranſlated, there is no neceſſity for a new licence by the ſucceeding biſhop (but *quære this*, for *it ſeems otherwiſe.*)

Nota; In this caſe *Topping* was made a party, but not brought to hearing, which, *by the court*, muſt have been done before the plaintiff could have a decree, if he had had a title in the other reſpect.

See *Perne* againſt *Oldfield*, under *Trinity* Term, 32 *Car.* II. *Wild* againſt *Alton*, under *Eaſter* Term, 4 *Wil.* and *Mar.*

November

November 17, A. D. 1729.

In the *Exchequer*.

Quaintrell againſt *Wright*.

Uſage as to tithes, ſhall explain a leaſe of a farm, with *all tithes*, againſt the very words. *Bunb.* 274. pl. 852.

PLAINTIFF brought his bill, as leſſee of the biſhop of *Norwich*, of the rectory of *Ingham* in the county of *Norfolk*, and produced his leaſe, dated *May* 8, 1723; the defendants ſet forth, that the biſhop of *Norwich*, at *Michaelmas* in the year 1693, demiſed the *Grainge* Farm, with all *tithes* thereto belonging, or therewith uſually letten; that this leaſe was ſurrendered *July* 7, 1724, and a new leaſe made the next day by the Biſhop of *Norwich* to the perſon under whom the defendants claim, with the ſame words; ſo inſiſt, that at the time of the grant of the rectory the tithes could not paſs to the plaintiff (of this farm) they being before expreſsly granted by the leaſe in 1693, and which was ſubſiſting at the time of the plaintiff's leaſe.

But *note*, there was proof that the leſſees of the rectory had uſually received the tithes of the whole pariſh, farm and all, and no proof of the defendant's ſide of the leſſees of the farm ever receiving tithes.

Therefore *by the court* (Lord Chief Baron *Pengelly*, and Baron *Carter* only in court) the defendant was decreed to account, for uſage ſhall explain this matter; and theſe tithes cannot be ſaid to belong to *Grainge* Farm, or to be uſually letten with it; and the word *tithes* was taken in only as a word of courſe, and from the old leaſe: if there had been a diſpute between the biſhop himſelf and the leſſee of *Grainge* Farm, it might have had another conſideration.

Hilary

Hilary Term, 3 Geo. II.

A. D. 1729-30.

In the *Exchequer*.

Sir *Thomas Pengelly*, Lord Chief Baron.

Sir *Lawrence Carter*.

Sir *John Comyns*.

Sir *Philip Yorke*, Attorney General,

Charles Talbot, Solicitor General,

Sir *William Thomſon*, Recorder of *London*.

In the *Exchequer*.

Hayes, Doctor of Divinity, againſt *Dowſe*.

THE court ſeemed to think, that vetches and clover cut green, and given to cattle, uſed in huſbandry, ſhould pay no tithes.

Vetches and clover cut green, and given to cattle of huſbandry, pay no tithe, *as it ſeemeth*. *Bunb.* 279. pl. 356.

See the caſe of *Hodges* againſt *Smith* under *Trinity* Term, 1 *Geo.* I.

In the *Exchequer*.

Woolferſton, Clerk, againſt *Mainwaring*, and others.

BILL by the rector of *Drayton Baſſet*, in the county of *Stafford* for tithes; the defendant inſiſts that the lord of the manor, time out of mind, for himſelf, and his tenants, on aſcenſion day, gave and delivered to the rectors nine cart loads of logwood, in lieu of all tithes;

Modus of nine cart loads of logwood; an hogſhead of cyder; and two-pence an acre; all held good. *Bunb.* 279. pl. 357.

tithes; and *by the whole court*, adjudged a good *modus*, as well as a *modus* of an hogſhead of cyder, which are equally uncertain, yet both held to be good.

Note, In this caſe one of the defendants inſiſted on a *modus* of twopence an acre for eighteen acres, but ſet forth no day of payment, nor by whom; but this being likewiſe found for the defendant, was eſtabliſhed, beingafter a verdict; *which note.*

February 4 and 9, A. D. 1729-30.

In the *Chancery.*

Chapman and others plaintiffs.

The Biſhop of *Lincoln*, *Mounſon*, and *Dobbs*, defendants:

and

Mounſon, the Biſhop of *Lincoln*, and *Dobbs*, plaintiffs,

Chapman and others, defendants.

Mr. *Wills* for the Plaintiffs.

Moſ. Rep. 266. pl. 153, 279. pl. 156. *Eq. Caſ. Abr.* 367. pl. 2. *Fitzgib.* 219. pl. 5. 2 *Peer Wil.* 565. *Barnard. B. K.* 493.

THIS bill is brought by the plaintiffs, the occupiers of ſeveral parcels of meadow, and paſture ground in the pariſh of *Burgh*, and *Winthrop* in the dioceſs of *Lincoln*, againſt the biſhop of *Lincoln*, who is ſeiſed in fee of the impropriated tithes, Mr. *Mounſon* leſſee of the biſhop for three lives, and Mr. *Dobbs* his under tenant, for the eſtabliſhment of two *moduſes*, and Mr. *Mounſon* filed his croſs bill, to have tithes paid to him in kind. One *modus* is, that it has been a cuſtom, time out of mind, for the occupiers of land in *Burgh*, and who do not reſide in *Burgh*, or

or *Winthrop*, to pay four-pence an acre for the tithe of hay, and the herbage of paſture lands, not plough-ed, or ſown, on good *Friday*, or ſo ſoon after as de-manded. The other *modus* is, that all thoſe who occupy lands in *Winthrop*, and are not inhabitants of *Winthrop*, or *Burgh*, ſhould likewiſe pay four-pence an acre, *&c.* and the plaintiffs, though they occupy lands in the pariſhes of *Burgh* and *Winthrop*, yet they live in other pariſhes. The *modus* does not relate to thoſe that reſide, but to thoſe that have lands, and are not reſident; theſe two pariſhes contain near eight thouſand acres of land near the ſea, and the inhabitants are not ſuf-ficient to cultivate and manure them, ſo theſe *mo-duſes* were ſettled to encourage the inhabitants of the neighbouring towns to occupy the lands, and they pay likewiſe, and contribute to all the pariſh duties, and the ſame cuſtom is obſerved in ſeveral adjoining pariſhes; we have proved a payment of this *modus* for fifty years, and that the pariſhioners who paid tithes in kind, on their removal to other pariſhes, have paid only this *modus*; and the defendants have not been able to prove, that tithes in kind have ever been paid: and therefore as our evidence is ſufficient, we have a right to have theſe *moduſes* eſtabliſhed, and if the defendants deny theſe *moduſes*, the court will firſt enter into the proof of them; and if they are not fully ſatisfied with the depoſitions will ſend them to a jury; but if they inſiſt they are not good in law, they muſt admit them to be well proved, and this is the con-ſtant courſe of the court of *Exchequer*, and it was lately ſo reſolved in *Quavus*'s caſe to eſtabliſh a *mo-dus* for fiſh, becauſe they would not trouble them-ſelves to give their opinion on an uncertain fact.

Mr. Solicitor General for the defendants,

We have two defences (and if we prevail in either the court muſt decree for us) that there are no ſuch

moduſes, or, if there are, that they are not good in law; but they ſay, if we controvert the legality, we muſt admit the *modus*, but the old courſe of the exchequer was, to conſider the legality of the *modus*, on a ſuppoſition it was proved, and not on admiſſion of it; and why ſhould the court put the parties to the trouble and the expence of trying a thing that is not material. By theſe *moduſes* a difference is made between inhabitants and ſtrangers, in a manner I never heard. In caſes between reſidents and out-dwellers, the *modus* is generally in favour of the pariſhioners, and what reaſon is there for theſe *moduſes*? why muſt the firſt extend to all ſtrangers, but thoſe that live in *Winthrop*, and the ſecond, to all but thoſe who live in *Burgh*? And they cannot be good in law, becauſe it would depend on the occupier, whether he would pay tithe in kind, or not.

A man indeed, by changing the courſe of his huſbandry, may change the nature of the tithe, for he cannot be ſuppoſed to do it to defraud the rector, but it muſt be preſumed, that every man will turn his land to the beſt advantage; but here, though the land continues in the ſame plight and condition, the tenant by removing out of the pariſh has it in his power to alter the tithe; and 1 *Lev.* 116. *Bawdry* againſt *Buſhel*, a prohibition was moved for on a ſuggeſtion of a cuſtom, that all the occupiers and tenants of *Skegnes*, that were inhabitants of any place out of the pariſh, ſhould pay to the vicar only four-pence a year for every acre; and it was alledged that the plaintiff occupied lands in *Skegnes*, but lived out of the pariſh, and the court denied the motion; becauſe the cuſtom was unreaſonable to give a greater privilege to foreigners than to inhabitants, who are at a greater charge, in reſpect to their reſiancy, to repairs and veſtments for the church: this caſe is reported likewiſe in 1 *Keb.* 602.

602. *Caſ.* 76. and it is there ſaid *per curiam*, that this was an unreaſonable cuſtom, and only invented by the country, to cheat the parſon, and that it was a leaping cuſtom, not fixed to any perſon certain, or to the land, nor of any permanence; and by *Keeling*, there is no precedent of any *modus* ſo variable and dancing: and this caſe ſhews, the court, on a ſuppoſal of the fact, determined the law before the *modus* had been proved, and would not let them try the *modus*, becauſe it was void in law: theſe *moduſes* are in favour of foreigners, others of inhabitants, and would ſubject the rector to the greateſt frauds: they have proved that they contribute as much as pariſhioners to the charges of the pariſh, and why then ſhould they be eaſed as to the tithes? And it is unreaſonable, that by their removal, the impropriator only ſhould be a loſer.

Lord Chancellor.

It is contrary to the rules and methods of all courts to determine the law, until the fact is either admitted or proved: on a motion for a prohibition, the court is not poſſeſſed of the cauſe, which makes the difference; but if it is once granted, the defendant muſt either demur, whereby he admits the *modus*, or plead the general iſſue; and if the fact is found againſt him, he has afterwards the benefit of the law. The court therefore declares, the plaintiffs have proved the *modus* to their ſatisfaction; but having a doubt, whether they are good in law, will be aſſiſted by two judges on *Monday* next and defers giving an opinion until that time.

The court will not conſider whether a *modus* is good in law, or not, till the *modus* is either admitted or proved.

Mr. Solicitor General for the defendants.

The queſtion is, Whether theſe *moduſes* are good in law? There is ſomething on the face of them extremely particular; they do not draw a line be-

tween the parishioners and the out-dwellers, but he that lives in either of the parishes, and occupies lands in one of them, pays tithes in kind, but if he lives in neither of the parishes, he pays only four-pence an acre.

A *modus* ought to be certain.

No rule is more established that relates to a *modus*, than that it ought to be certain, in respect of the lands, the person, the time, and the sum; and that it ought to be as certain as the tithes in whose room it comes; but this *modus* is uncertain in all these respects: if to day the lands are occupied by the inhabitants of either parish, tithes are to be paid in kind; if to morrow they are occupied by strangers, this *modus* only is due; suppose these lands, were jointly occupied by two, one of which lived in either of these parishes, and the other in neither of them, how are they to pay tithe, either both the tithe in kind, or both a *modus*, or one of which lived in either of these parishes, and the other in neither of them, how are they to pay tithe, either both the tithe in kind, or both a *modus*, or one tithe, and the other a *modus*; or suppose the occupier lives one time of the year out of these parishes, and the other in one of them, what is he to pay? And is a *modus* to depend on the residence of the occupier? which is variable and uncertain, and entirely in his own breast, and the impropriator could not follow so variable a right.

A *modus* ought not to be subject to fraud.

And as a *modus* ought to be certain, so it ought not to be subject to any fraud: tithes must follow the nature of the lands, and only change as they do, but here the change depends on the will of the occupier, whether he will reside or not. How is it possible for the rector to deal with these people for his other tithes; if they cannot bring him to their terms, they will

will threaten to remove to another pariſh, and may cheat him, by removing only to the other ſide of the hedge; and we have proved this to have been really done, and that one went and built a houſe on the other ſide of the road in another pariſh.

As theſe *moduſes* then have no reaſon to ſupport them, and are liable to this fraud, and we have proved it to have been put in practice, your lordſhip will not eſtabliſh them.

They ſay there are like cuſtomary payments in *Skegnes*, and other neighbouring pariſhes, with this difference, that the *modus* extends to all ſtrangers, but the cuſtom as to that pariſh was adjudged at law to be a void cuſtom. 15 *Car.* II. in the caſe of *Bawdrie* verſus *Buſbel.* 1 *Keb.* 602. *Caſe* 76. 1 *Lev.* 116.

Mr. *Lutwych.*

There muſt be a certainty in a *modus*, that the parſon may know what to demand, and it may be ſued for in the ſpiritual court; but can any one tell in this caſe, what the parſon will be intitled to? A *modus* ſuppoſes an antient contract to have ſo much yearly, in lieu and diſcharge of tithes, and it muſt be perpetual; but this cuſtom is deſultory.

There ought to be a certain and perpetual rule for the parſon to go by in his demand; this *modus* is uncertain too, as to the place, it may be converted to arable land, and then it muſt pay tithe; but when it is paſture or meadow, by only ſtepping into the next pariſh, the occupier, inſtead of paying tithe is only to pay this *modus*, and the pariſh may combine together; you ſhall live in my houſe, and I will in yours; and there is no reaſon or foundation for this cuſtom. If any privilege is to be allowed to the occupiers,

cupiers, the parishoners ought to have it, in respect of the burthensome offices they undergo; and as this is a discouragement to the inhabitants, so it is a loss to the parson too; for the more inhabitants there are, the greater are his small tithes; in the case of *Bawdry* versus *Bushel*, the court were so clear as to the illegality of the *modus*, they would not grant a prohibition, and this case is stronger, because the plaintiffs pray to have these *moduses* established.

Mr. *Peere Williams.*

Tithes are the revenue of the church, and due of common right, which it is unreasonable the parson should be defeated of, by the act of the tenant, and so slight an act too, as a removal; whereas no *modus* is good that depends on the act of the party, without it be some benefit to the parson. 1 *Rol. Abr.* 649. (8) to repair and beautify the body of the church, and to find necessaries for it, is no good *modus*, because the parson has no advantage by it, yet that is a pious and expensive work; but what does the parson gain by the removal, or what expence is the party put to? and if a reasonable commencement, if it cannot be shewn, it is not a good *modus*. The *modus* is to arise, though the occupier takes only a lodging in another parish, and though he leaves his house empty, what reason, what foundation can be given for it? and it tends to depopulate and desolate a parish, for interest will always be a prevailing motive: a good *modus* must arise from the consent of the parson, patron, and ordinary, but how can we ever suppose the parson would consent to these *moduses*?

To repair the church is no good *modus*.

It is a rule as to a *modus*, that no custom introductive of fraud is to be allowed. 1 *Leon.* 99. *Stebbs* versus

verſus *Goodlack*, the cuſtom was, that the parſon ſhould have for his tithes the tenth land ſowed with any manner of corn, and he ſhall always begin his reckoning at the firſt land that is next to the church, *&c.* The parſon ſhewed that the defendant by fraud and covin ſowed every tenth land which belonged to the parſon, very ill, and with ſmall quantity of corn, and did not dung and manure it as he did the other nine parts, by means whereof, whereas the other nine every of them yielded eight cocks, the tenth yielded but three cocks; and for this matter the parſon libelled in the ſpiritual court, and confeſſed the cuſtom, but for abuſing the cuſtom, prayed to have his tithes in kind. The defendant prayed a prohibition, and the parſon a conſultation, and the opinion of *Wray*, juſtice, was that the cuſtom was againſt common reaſon, and ſo void. *Cro. El.* 446. (10). It was adjudged in Sir *Charles Morriſon*'s caſe, quoted in the caſe of *Gryſman* againſt *Lewes*, where one preſcribed to pay the tenth part of corn in the ſheaf, for the tithe of all which is in ſheaf, and of all which is raked, that this was an unreaſonable preſcription, for then he may put the leſſer part in ſheaves, and leave the greater part to be raked.

Moor 919. Caſ. 1290.

Moor 913. Caſ. 1290.

A preſcription to pay the tenth part of corn in the ſheaf for the tithe of all which is in the ſheaf, and of which is raked, is not good.

Another rule is that a *modus* ought to be certain and permanent. 2 *Salk.* 657. *Caſ.* 4. *Startup* againſt *Doderidge*, a *modus* to pay two ſhillings in the pound of the improved rent was held naught, upon a motion for prohibition, for that is to riſe and fall as the land is let, and the parſon cannot know it. 2 *Salk.* 656. *Caſ.* 3.

A *modus* to pay 2*s.* in the pound of the improved rent is naught. 11 Co. 15 B. 3 Lev. 255.

And this cuſtom is unreaſonable, as it gives a greater privilege to foreigners than inhabitants. 1 *Lev.* 116. and though the reaſon given in that

book is not law, yet the inhabitants are ſubject to burthenſome and expenſive offices, from which non-reſidents are exempt; for by the 43 *Eliz.* the overſeers and church-wardens are to be choſen out of the inhabitants, and therefore there is more reaſon to favour them. Is leaving the pariſh a good conſideration? the plaintiffs do not ſet out for what time there muſt be a non-reſidence: will a week or a fortnight be ſufficient?

Mr. Attorney-general for the plaintiff.

Notwithſtanding the defendants have ſaid that a *modus* ought to be more clear and poſitive when the plaintiff prays to have it eſtabliſhed, than when it is ſet out by way of defence, yet in both caſes it muſt be proved, and muſt be good in law, which is ſufficient. We have proved theſe *moduſes* beyond contradiction, and the defendants have not produced one inſtance that tithe was ever paid in kind, and therefore they muſt ſhew very ſtrong arguments againſt the legality of them, and after ſuch long uſage, they muſt not be ſet aſide on ſlight grounds, to the prejudice of thoſe who have purchaſed the lands, and whoſe intereſt muſt be conſidered, as well as the parſon's.

Two things are neceſſary to a *modus*, immemorial uſage, and payment of *quid pro quo*, which we have proved; and ſecondly, a reaſonable commencement, and it is ſufficient to ſhew that a *modus* might have a reaſonable commencement, though we cannot poſitively prove that was the reaſon of it; the fact is, that theſe large pariſhes contained a much greater quantity of ground than could ſome years ago be occupied by the inhabitants; therefore that the lands might

might not lie waſte, which would be a loſs both to the parſons and owners, for the encouragement of ſtrangers to occupy theſe lands, and that the parſon might have ſomething, the parſon, patron, and ordinary, came to an agreement with them, for the payment of this annual ſum, and it is ſufficient for us to ſhew, that this might have been the reaſon for theſe *moduſes*, but it is not neceſſary for us to prove it was ſo.

As to the caſe in 1 *Lev.* 116. the law makes no difference, whether the *modus* tends to the encouragement of the pariſhioners, or of ſtrangers, and if the cuſtom had extended to all ſtrangers, they would have been more prejudicial to the parſon, and the reaſon of them might have been to prevent any fraud from the two pariſhes lying ſo contiguous.

Moſt of the defendants objection ariſe from the caſe of *Bawdry* and *Buſhel*, but no concluſion can be drawn from that caſe that will govern this. *Keble* has not ſet forth the *modus* for paſture and meadow ground, but generally for every acre of land.

Their firſt objection is, that theſe *moduſes* are unreaſonable, but I have ſhewn there might have been a very good reaſon for their commencement, and therefore any objections to them are of no weight, and the ſame might be made to many *moduſes*, which have been adjudged good in law.

Secondly, it is ſaid that theſe *moduſes* were invented to cheat the parſon, but this is no objection unleſs they can prove that ſuch a uſe has been made of them, that the occupier removed on any quarrel with the impropriator

impropriator or to diſtreſs him, as to the other tithes, and all *moduſes* are liable to fraud, but it is not eaſy for the pariſhioners, or probable that he would leave his abode on this account, and he would loſe more by quitting his houſe, than he could ſave by the tithes.

Thirdly, they ſay theſe *moduſes* are not certain, as to the perſons, or as to the lands; but a preſcription for a *modus decimandi* need not be more fixed than for a *non decimando*; the *Ciſtertians* were diſcharged of tithes *quamdiu in propriis manibus, &c.* which was a variable preſcription as to the perſons, why may not lands be liable either to pay tithes or a *modus*, in reſpect of the occupiers as well as by courſe of huſbandry? *Godbolt* 194. *Brown's* caſe; there was a *modus* for tithe hay in a particular field; which was ſowed for ſeven years, that does not deſtroy the *modus*, but the rector ſhall have the tithes of the corn, the vicar the *modus* for the hay. It might be ſaid in that caſe, ſhall it be in the power of the occupier, whether he will pay tithe in kind or not, or to whom he will pay them? that is as variable and dancing as the preſent cuſtoms, and puts it alſo in the power of the occupier to whom he will pay.

If a field is ſowed for ſeven years the rector ſhall have the tithe of the corn, and that does not deſtroy the *modus* for the tithe of hay.

Such a *modus* has been allowed good at law, *Cro. Eliz.* 136. (4) *Coteſord* againſt *Peaſe*, the parſon ſues the defendant for tithe in ſpecie of certain paſture in *N.* the defendant for a prohibition ſurmiſes that he was an inhabitant in *S.* and that time out of mind every inhabitant there that had paſtures in *N.* had paid tithes for them to the vicar of *S.* and that the vicar of *S.* had paid the parſon of *N.* two-pence for every acre, and the court held, that the prohibition did lie, for it is as if he had preſcribed to pay two-

A foreigner may preſcribe to pay two-pence for every acre of paſture he occupies.

two-pence for every acre, *Cro. Eliz.* 136. (5) and there are many cafes in the *Exchequer*, in which this *modus* has been eſtabliſhed.

The caſe in *Roll*'s Abridgment that the occupiers uſe to repair and beautify the church, and therefore ought not to pay tithes, amounted to a *non decimando*; but here the parſon has four-pence an acre.

The caſe of *Startup* and *Doderidge* was to pay two ſhillings in the pound of the rack rent or beſt improved value, which was uncertain, here the ſum to be paid is fixed and certain.

Mr. *Wills*.

The conſtant uſage proves that there was ſuch a contract, and we have proved that the ſame *modus* has been conſtantly paid in the pariſh of *Skegnes*, notwithſtanding the prohibition was denied in the caſe of *Bawdry* and *Buſhel*, and the inhabitants have more benefit than ſtrangers, they have the inſtruction of the miniſter.

The firſt objection is, that theſe *moduſts* are uncertain, which has been fully anſwered, but they are as certain and permanent, as many others which have been eſtabliſhed, where a *modus* is for tithe of hay, and if the lands are ſown to pay tithe in kind; in that caſe the parſon cannot tell before-hand, how much he ſhall have the next year; he cannot tell whether it will be mowed or ſown, while the lands are occupied by a pariſhioner, *&c.* Tithes in kind are to be paid, if by a ſtranger four-pence, *&c.* a *modus* is not permanent, when any one year nothing is to be paid to the parſon, becauſe that would amount to

a *non*

a *non decimando*; but here ſomething muſt be paid, and theſe cuſtoms are certain as to the lands, they are for meadow and paſture ground; and as to the perſons too, they muſt be paid by the occupier.

The ſecond objection is, that they are liable to fraud, but *moduſes* more ſubject to fraud have been eſtabliſhed; for if they are made uſe of to cheat the parſon, the court will relieve him, and make them pay tithes in kind, which accounts for the caſe of *Stubbs* and *Goodlack*, where the court would not grant a prohibition in ſupport of a cheat, though the *modus* was confeſſed; but *Moor* in the report of that caſe 913. caſe 1290. ſays a prohibition was awarded, notwithſtanding the *covin*, becauſe the parſon might have an action on the caſe for the fraud at the common law; the glebe do not pay tithes to the vicar, yet if the impropriator put cattle when yeaning on that land, the vicar ſhall recover the tithes becauſe of the fraud, *Moor* 909. caſe 1277. *Cro. Eliz.* 467 (25) *Moor* 863. caſe 1186. *Hob.* 39.

The other objection is, that the parſon muſt have a benefit; ſo he has by theſe *moduſes*; they cannot mean, that he muſt have as much as the tithe, for then the objection would run to all *moduſes*, but that what came in lieu of the tithes muſt be paid to the parſon himſelf.

Mr. *Creuſe*.

There are many precedents of ſuch a *modus* being adjudged good, *Hill.* 16. c. *a.* 1. *Rot.* 1548. in C. B. 2 *Brown's* Entr. 194, 195, 196. The vicar libelled for tithes in the ſpiritual court, and a prohibition was granted on ſuggeſtion that ſtrangers who occupied lands

lands in the pariſh ſhould pay the *modus* of ten-pence an acre, and there are many decrees for the payment of ſuch a *modus* in the court of *Exchequer*, *Trin.* 12 *Car.* 2. *Piggot* againſt *Lovel.* The vicar brought his bill to be paid tithes in kind, and the defendant ſuggeſted a cuſtom for foreigners to pay four-pence an acre, for the tithe of meadow and paſture, and an iſſue was directed, and a verdict found for the defendant, and the bill was diſmiſſed. Both theſe reſolutions were prior in time to the caſe of *Bawdry* and *Buſhel*, which was in the 15 *Car.* 2. and there have been many ſuch decrees ſince that time too. *Hill.* 25 *Car.* 2. the rector filed his bill for ſuch a cuſtomary *modus* of ſix-pence an acre and the *modus* was eſtabliſhed. *Trin.* 30 *Car.* 2. a bill was brought for payment of tithes; the defendant pleaded ſuch a cuſtom as in this caſe, and two iſſues were admitted; one, whether there was ſuch a cuſtom; and the other, what lands the defendant occupied: and the court decreed accordingly. 32 *Car.* 2. The bill was brought for tithes, and the defendant pleaded a *modus* of twelve-pence an acre for land newly converted to tillage, and four-pence for antient paſture, there the court were of opinion that the *modus* was well proved, and ordered a caſe to be made for the opinion of the judges, who were of opinion, that this was a void *modus*, and certainly it was ſo, for being coupled with the twelve-pence for the new converted ground it could not be good. But afterwards, *Mich.* 2 *W.* and *M. Blaxton* againſt *Langton*, the ſucceſſor of the plaintiff brought a bill for tithes in kind, and the defendant inſiſted on the *modus* of four-pence an acre. The plaintiff confeſſed the cuſtom, but claimed the benefit of the former decree, and declared that to be his only inducement for bringing his bill, but the court declared it to be a good

It is a good modus for thoſe who reſide out of the pariſh to pay ten-pence an acre for the lands they occupy in it.

a good cuſtom. In the caſe of *Row* againſt the Biſhop of *Exeter*, a *modus* to pay two-pence a hogſhead for cyder was eſtabliſhed in *Roll*'s Abr. 649. caſ. 8. 650. caſ. 9. it is ſaid the cuſtom would have been good, if it had been to repair the chancel, becauſe that would have been a benefit to the parſon, here the thing to be paid is certain, and that is the certainty requiſite in a *modus*. 1 *Keb.* 612. ca. 86. a prohibition was refuſed on ſuggeſtion of a *modus* to pay four ſhillings for every day's ploughing of wheat, and two ſhillings for every day's ploughing of barley, for the uncertainty. But if the *modus* had been ſo much for every day's work, with an averment that it was certainly known, and how much it contained, it would have had ſufficient certainty.

A *modus* of two-pence a hogſhead for cyder is good.

A *modus* to repair the chancel is good.

A *modus* to pay four ſhillings for every day's ploughing is not good, but to pay ſo much for every day's work with an averment of what it contained, and that it was certainly known, is good.

Mr. Juſtice *Forteſcue*.

I think there is no difficulty to determine this queſtion, whether theſe are legal *moduſes* or not, and I am of opinion that they are. Firſt I would obſerve on what *moduſes* are founded, the books ſay they are real compoſitions, and they are allowed both by the canon and civil laws, and they are founded on agreements, they muſt be contained in ſome inſtrument, and if it is loſt the parties are allowed to preſcribe, and this was the reaſon Lord Chief Juſtice *Holt* went upon in the caſe of *Startup* and *Dodderidge*, (though he was againſt the *modus*) that as it was a contract between the parties it was hard to break through it, when it was well proved.

What a *modus* is.

But the defendants ſay theſe *moduſes* are unreaſonble. I have ſeldom known this objection made to a *modus*, becauſe no body can tell at this diſtance of time whether it was reaſonable or not, at its firſt commencement;

mencement; but the law ſuppoſes it was, 8 *Ed.* 4. 13. b. But they are not unreaſonable, they are an eaſe to the parſon, for he is not bound to attend foreigners. But it is ſaid, that they take more notice of foreigners than inhabitants, but was it not in the power of the parſon, patron, and ordinary to give them what privileges they pleaſed? they create no burthen on the inhabitantants.

But it is objected, that they are uncertain, and if they are then indeed they are not good in point of law, for they would amount to a *non decimando*, but can any caſe happen in which the parſon will not either have this *modus* or the tithes? and there is no uncertainty, but what is to be paid on every contingency is fixed. In *Roll's* Abr. 265. a *modus* to pay a ſhilling or thereabouts for every acre of arable land was adjudged uncertain, and as the cuſtoms are laid with relation to the pariſhes, they are an advantage to the rector, and a foreigner may come and reſide in the pariſh, and then he will pay tithes, as well as one who occupies lands, and is a pariſhioner, may have it. Here is no uncertainty in the *modus*, but the only thing uncertain is, whether the *modus* or tithes in kind are to be paid?

A *modus* to pay one ſhilling or thereabouts is not good, for the uncertainty.

In this caſe the parſon has a benefit, he has fourpence an acre, and I do not know but once it might be a fourth part of the value of lands. The *modus* to repair the church in lieu of tithes could not be good, becauſe the pariſhioner was bound to do it without ſuch a *modus*, and doing it was no benefit to the parſon; but if it had been to repair the chancel, it had had been a good *modus*, for that would have been an advantage to the parſon.

I can-

I cannot rely on the case of *Bawdry* and *Bushell*, it was determined on a motion, and the prohibition might be denied for other reasons, it is a strange resolution. Sure a man may give up his right on what terms he pleases, and the reason mentioned in *Leo.* is not good in law, for it is a settled point, that foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties, and Mr. *Creuse*'s cases are expressly in point; and in the case of *Bate* and *Howland* decreed in the court of *Exchequer* 1726, a *modus* to pay four-pence an acre for high land, and three-pence an acre for low land, was adjudged a good *modus*.

Foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties.

A *modus* for every occupier to pay four-pence an acre for high and three-pence for low land is good.

Mr. Justice *Reynolds*.

A *modus* is a real composition run into a prescription, made *concurrentibus iis qui de jure requiruntur*, who might dispose of the rights of the church as well as private persons of theirs, and if the contracts now appeared in writing they would be good, and the memorials being lost, the parties may prescribe and shall have the advantage of them as if they appeared. If these customs were universal they would undoubtedly be good, and then the question will be, whether the restrictions shall make them void, and if they would be good generally, shall the parson object when the restrictions are for his benefit? and it cannot now be discovered whether the parishes were not formerly united, or did not partake of sacramentals; but if these *moduses* are so uncertain, that the parson cannot know what to demand, I allow they are bad. All the certainty requisite to a *modus* is this, that when the circumstances are the same, there shall be the same *modus*, and it is not uncertain, because the parson is now to have a *modus*, and now to be paid tithes,

for

for that is as certain, as the caſes of *non decimando*, where the parſon has ſometimes tithes, and ſometimes nothing; and this is no loſs to the inhabitants, they do not pay more, though the parſon has leſs, and the ſurplus is not thrown as a load upon their eſtates.

The ſingle authority for the defendants, is the caſe of *Bawdry* and *Buſhell*, which was determined on a ſudden motion, and no rule given to ſhew cauſe, and is founded on reaſons that are not law; and though we have the contemporary reports of *Siderfin* and *Raymond*, they take no notice of that caſe, and I believe the parties had recourſe to another court that granted a prohibition, becauſe the cuſtom has ſubſiſted in that pariſh ever ſince, notwithſtanding the prohibition was denied, and that caſe ought not to be regarded, ſince it ſtands ſingle, in oppoſition to ſo many contrary reſolutions both before and ſince that time, many of which authorities have been cited by Mr. *Creuſe*.

Lord Chancellor.

I am of the ſame opinion. The plaintiffs have proved theſe *moduſes* to be time out of mind, and the defendants have not produced a ſingle inſtance of the payment of tithe in kind, and as they relate to ſo many pariſhes, it would occaſion a great confuſion to ſet them aſide. Every *modus* ſuppoſes a compoſition, which being loſt, runs into a preſcription. Suppoſe the compoſition had been for all occupiers, by the caſe that has been cited by Mr. Juſtice *Forteſcue*, that would be good, and why ſhould it make the cuſtom unreaſonable to reſtrain it to thoſe that live out of the two pariſhes? does making the compoſition with part only of the occupiers make it illegal? they might

A *modus* for occupiers of land in *Burgh*, not reſiding in *Burgh* on *Wintbrop*, to pay four-pence an acre for the tithe of hay and the herbage of paſture is a good *modus*.

contract with whom, and on what terms they pleaſed; and though *Keeling*, in the caſe of *Bawdry* againſt *Buſhell*, ſays there was no precedent of ſuch a *modus*, Mr. *Crueſe* has produced two reſolutions before that time, but they not being in print, I ſuppoſe he had not ſeen them, and that caſe was adjudged on a ſudden motion.

There is no uncertainty in theſe *moduſes*, for then indeed no time or uſage could make them *good*; they are no more uncertain, than the preſcription by the *Ciſtertians* in *non decimando*. Does not the tithe alternately belong to the rector or vicar, as they are great or ſmall tithes? Theſe cuſtoms therefore being no way uncertain, and having held ſo long muſt be eſtabliſhed on the original bill, and the defendant Mr. *Mounſon*'s croſs-bill for tithes in kind muſt be diſmiſſed, without coſts, in caſe he ſubmits to the *modus*.

Peer Will. Rep. 575.

Michaelmas Term, 2 Geo. II.
November 14, A. D. 1728.

In the *Exchequer*.

John Pratt, Eſq. — Plaintiff.

William Hopkins, *Benjamin Midford*, *Henry Talbot* and *Joſeph Farmer*, } Defendants.

Lands exempted from tithes, as being part of the demeſnes of an ancient monaſtery, being incloſed by act of parliament, ſhall not be made liable to tithes by any general words in the act. 3 *Brown*, 521. pl. 74.

THE defendants were proprietors and occupiers of ſeveral parcels of land, formerly part of *Glaſtonbury* common, and commonly called or known

by

by the ſeveral names of *Common-moor*, *Black-acre*, and *South-moor*, *alias Alder-moor*, and were incloſed by virtue of an act of parliament made for that purpoſe in the year 1721.

The plaintiff in the year 1719 obtained a leaſe from the Biſhop of *Bath* and *Wells* of the rectory and parſonage of St. *John Baptiſt*, with the chapel of St. *Bonning* in *Glaſtonbury*, and other chapels therein mentioned, and of all tithes thereto belonging, for three lives; and after the incloſure of the commons, *viz.* in *Michaelmas* Term, 1724, he exhibited his bill in the court of *Exchequer*, againſt the defendants and others, in order to compel them to account with and make him ſatisfaction for the tithes ariſing out of the new incloſures, and particularly out of *South-moor*.

The plaintiff being well appriſed of the defendants defence with relation to their lands in *South-moor*, *viz.* that the ſame were exempt from the payment of tithes, as having been part of the demeſnes of the great and antient monaſtery of *Glaſtonbury*, did in his bill alledge, that *South-moor* was not part of the demeſnes of the ſaid monaſtery; but if it was, and might for that reaſon have been exempt from tithes before the making the act for incloſing the ſaid commons, yet the ſame were made liable and ſubject to the payment of tithes by the following clauſe in that act:

"Provided always, and it is hereby declared and enacted by the authority aforeſaid, that nothing herein contained ſhall extend, or be conſtructed to extend, to prejudice any right or intereſt which the Lord Biſhop of *Bath* and *Wells*, the impropriator of

the rectory or parſonage of St. *John Baptiſt*, in *Glaſtonbury* aforeſaid, or his leſſee, hath, have, or may have to any tithes which ſhall belong or may accrue to them or either of them, out of the ſaid new incloſures hereby to be made, and that ſuch impropriator, or his leſſee for the time being, ſhall have and receive all tithes, of what kind ſoever, of and from the ſaid new incloſures, as he is or ſhall be by-law intitled to have and receive the ſame, as rector or impropriator of the ſaid pariſh; notwithſtanding any *modus*, or pretence of a *modus* or compoſition in any other parts of the ſaid pariſh or any exemption whatſoever."—"And it is hereby further enacted by the authority aforeſaid, that the ſaid *Biſhop of Bath and Wells*, the impropriator of the *rectory or parſonage* of St. *John Baptiſt* in *Glaſtonbury*, for the time being, or his leſſee as the ſaid biſhop or leſſee ſhall be reſpectively poſſeſſed or intitled to the tithes of the ſaid new incloſures, ſhall, for a further augmentation and better proviſion for the curate of the ſaid pariſh church of St. *John Baptiſt* in *Glaſtonbury*, pay or cauſe to be paid unto the curate of the ſaid pariſh, and his ſucceſſors for the time being, yearly and every year, the full ſum of twelve pounds of lawful *Britiſh* money out of the tithes that ſhall or may ariſe out of the ſaid new incloſures hereby to be made free from all taxes whatſoever."

To this bill the defendants put in their anſwers, and thereby admitted the plaintiff's right to tithes, out of all ſuch parts of the new incloſures, as lay in *Common-moor*, or *Black-acre*; but as to ſuch parts of them as were taken out of *South-moor*, they inſiſted that the ſame were exempt and free from tithes; the ſaid common called *South-moor*, which had heretofore been of much greater extent than what was intended to

be

be incloſed by the act, having formerly been part of the demeſnes of the aforeſaid monaſtery, and no tithes having been paid or anſwered for any part thereof: and the defendants ſubmitted to the court that the act, as paſſed, had not given the plaintiff any right to the tithes, to which he was not before entitled by law.

In *Trinity* term, 1726, the plaintiff replied to the defendants anſwers, and ſoon after came to an agreement with them, to accept what was due for tithes ariſing out of *Common-moor*, and *Black-acre*, together with his coſts; which being ſtated together at 17 *l.* 9 *s.* 2 *d.* was accordingly paid to the plaintiff.

After this, the plaintiff and defendants proceeded to examine their witneſſes, touching the demand of tithes, out of *South-moor*, and the depoſitions being duly publiſhed, the cauſe came on to be heard before the Barons, on the 19th of *July*, 1728, and was heard in part, and, by conſent on both ſides, adjourned over to the next term; and, upon a full hearing on the 14th of *November* following, the Barons unanimouſly delivered their opinions, that the defendants had fully proved the exemption inſiſted on by their anſwers; and that the act for incloſing the commons, had given the plaintiff no new right to tithes out of the ſaid lands in *South-moor*, and therefore decreed that the plaintiff's bill ſhouldbe diſmiſſed with coſts.

See this caſe on appeal, under *Eaſter* Term, 4 *Geo.* II.

Hilary Term, 3 Geo. II.

February 26, A. D. 1729.

In the *Houſe of Lords.*

William Kelynack, Richard Richards, Philip Kelynack, and one hundred and ſixteen others, pariſhioners and fiſhermen of the pariſh of *Paul*, in the county of *Cornwall*, —— —— } Appellants.

William Gwavas, —— Reſpondent.

Tithe of fish cannot be claimed by custom, and cannot be claimed under a modus or immemorial usage, for where the subject is incapable of a grant by custom, it is also incapable to claim the exemption. Fitz. 253. 3 *Bruce*, 484.

THE defendants appealed from the decree pronounced by the court of *Exchequer*, on the hearing of this cauſe, upon the equity reſerved to the Houſe of Lords, which was there heard, *February* 26, 1729; and on the behalf of the appellants, it was contended, that by the variation of the firſt order of the decree, in directing the iſſue to be tried by a jury of *Middleſex*, inſtead of a jury of *Cornwall*, the appellants were put under great difficulties and diſadvantages, in bringing their witneſſes from ſo great a diſtance as near three hundred miles, and eſpecially ſuch of them as were aged and infirm, and that a jury of *Middleſex*, who were entire ſtrangers to the cuſtoms of *Cornwall*, and to the manner of fiſhing there, could not be ſo well able to judge upon the matter in iſſue, as a jury of that county; that the cuſtom was unreaſonable and void, inaſmuch as it required the tenth part of the fiſh to be paid in kind, without any allowance or deduction to be made, for the charges and expences in catching the ſame, or in providing boats, nets, and other fiſhing craft; whereas the tithes demanded in this caſe, could only be due by cuſtom, and claimed

ed as a perſonal tithe, and as ſuch, all expences and charges of that kind ought to be deducted; but which, though it moſt commonly amounted to the half, and ſometimes to the full value of the fiſh ſo taken, was not provided for by this decree, and though the mooring, tying, and keeping of boats, nets, and other fiſhing craft, in the pariſh, when not uſed, were aſſigned as a reaſon, or conſideration for the cuſtom; yet the reſpondent did not find or provide any convenient place for that purpoſe, or contribute towards the charge thereof; but the appellants were forced, at their own expence, to procure proper places for keeping their fiſhing craft, both when uſed and when not uſed; and to make yearly payment to the owners of the ſoil, for the ſame; that by this cuſtom, the appellants are obliged to pay tithes in kind for all fiſh, not excepted in the cuſtom, which are taken not only in *Mount's-bay*, but alſo in the adjoining ſeas, which is unlimited and unconfined, and in conſequence thereof they are obliged to land their fiſh in the ſaid pariſh, and not elſewhere, to be there told or taſted, and the tithes to be paid in kind before they can cure or diſpoſe of them, though taken in places ever ſo remote; which many times, from great diſtance and ſtormy weather, is impracticable, and puts them under great difficulties and hazard, either of keeping the fiſh ſo long, as to render them unfit for uſe, or being deprived, by attempting to land them, of the opportunity and advantage of catching thoſe quantities, which they otherwiſe might take: that if this cuſtom ſhould prevail, it would tend to the ruin of the appellants, and their families; and they would be under the neceſſity of breeding up their children to other buſineſs, in order to enable them to get a living;

whereby a very valuable nurſery for ſeamen would be deſtroyed, which has in all times afforded a ſupply of the ableſt men for the public ſervice, in time of need; and the fiſhing trade in thoſe parts, ſo advantageous to the nation, would be in great *danger* of being loſt. It was therefore hoped, that the decree ſhould be reverſed, or at leaſt ſo altered, as that the appellants might only account for the tenth penny of the profit made of the fiſh by them taken, firſt deducting their charges and expences in catching ſuch fiſh, and in providing boats, nets, and other fiſhing craft, and for mooring and keeping the ſame when not uſed.

To all this it was anſwered, on the other ſide, that the cuſtom would be vain and *fruitleſs*, *if it* extended only to ſuch as were owners of any fiſhing craft with which the fiſh were taken; becauſe in that caſe every one might exchange with his neighbour the uſe of their craft, and none catch a fiſh in his own craft; that the diſtance at which fiſh might be taken and brought to ſhore freſh and good, would ſufficiently limit the extent of the cuſtom, as to the fiſh taken in *Mount's-bay*, and the adjoining ſeas, but any other limits would wholely fruſtrate the cuſtom, ſince it would be impracticable for the rector to diſcover whether the fiſh were taken within or beyond ſuch other limits; that no direction was given by the decree, as to landing the fiſh, it only eſtabliſhed the cuſtom, and directed the appellants to account for the value of the tithes demanded by the reſpondent, and there was nothing, either in the cuſtom or decree, which obliged the appellants to do any thing impoſſible or unreaſonable. That the tithe of fiſh being payable only by cuſtom, was admitted; but that it could be claimed only as a perſonal

tithe *deductis expenſis*, was denied; for where, as in the preſent caſe, tithes in kind are due only by the cuſtom, it ſeems impracticable to deduct the expences; that the ſtatute of *Edw.* VI. which gives remedy for predial and perſonal tithes enacts expreſsly, that tithe fiſh be paid according to cuſtom; and therefore this is within the reaſon of predial tithes, where no allowance or deduction is made for the rent of the land, plowing, ſowing, reaping, *&c.* and the anſwer in this caſe is, that no ſuch expences are allowable by the cuſtom.

2 & 3 *Edw.* VI. chap. 13

After hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decree therein complained of, affirmed.

Decree affirmed, Lords Journ. XXIII 490. *Bunb.* 258, 3 *Brown.* 486.

See this caſe under *Trinity* Term, 32 *Car.* II. *Trinity* Term, 1 *Geo.* II. *Michaelmas* Term, 2 *Geo.* II. *Ex parte Gwavas*, under *Eaſter* Term, 2 *Geo.* II. and the caſe of Earl *Scarborough* againſt *Hunter*, under *Eaſter* Term, 6 *Geo.* I.

Eaſter

Eaſter Term, 3 Geo. II.

A. D. 1729.

In *Chancery.*

Fox * and others againſt *Ayde* and others.

A *modus* that in conſideration the pariſhioners made the tithe graſs into hay, therefore the pariſhioners, inhabitants within the pariſh, were to pay no tithes for the herbage of dry and unprofitable cattle, and they proved, that the pariſhioners, time out of mind, had paid no tithe of this herbage; yet the court held it to be a material objection on the *modus*, that foreigners living out of the pariſh made the tithe graſs into hay, and yet paid tithe herbage. *Peere Will.* Rep. 520. pl. 168. *Fitzgib.* 52. pl. 3.

THIS was a bill brought to eſtabliſh a *modus*, in favour of the inhabitants of the pariſh of *Sturton*, in *Nottinghamſhire*; the *modus* was in conſideration, that after the graſs was cut, the pariſhioner, at his own coſts and charges, did make the tithe-graſs into hay, by ſtrewing the graſs upon the ground, (which is called tedding of it) and afterwards gathering it into week and wind-rows; therefore the perſons that inhabited within this pariſh (which pariſh appeared to be the greateſt part thereof meadow land) were to pay no tithes for the herbage of dry and unprofitable cattle.

But though it was proved in the cauſe, that the pariſhioners had not, time out of mind, paid tithes for the herbage of dry and unprofitable cattle, yet there was no evidence, that this excuſe for *not* paying of tithes of herbage, was in conſideration of the pariſhioners making tithe graſs into hay; on the other hand it was proved, that foreigners, thoſe who lived out of the town, made the tithe graſs into hay, as well as the inhabitants, and yet paid tithe herb-

* Heard firſt by default, *5th July* 1728, and alſo on defendant's ſhewing cauſe, *5th of May*, 1729. *P. Wil. Rep.* 520. *pl.* 168.

age;

age; alſo it was proved by the plaintiff, that the graſs was tedded and ſpread, and not divided into heaps or cocks, until the ſame was made into hay; and in this pariſh there was a vicar endowed with the ſmall tithes, the rectory an impropriation, and that the vicar had 40 *l. per annum* out of it.

Lord Chancellor.

1*ſt*, This may be a good cuſtom or *modus*, to excuſe the occupier of the ſame land wherein the pariſhioners made graſs into hay from paying tithe after herbage; but it can be no good *modus* to excuſe the herbage tithe of other land; for at that rate a man might mow and make into hay a ſmall parcel of ground, containing about a quarter or half an acre of land, and by this means be excuſed from the tithe herbage of 100 head of cattle.

The court held it to be a void *modus*, that the making the tithe graſs into hay, ſhould not only excuſe that ground from paying tithes for herbage, but that perhaps a ſmall quantity of meadow ground, by making the graſs thereof into hay, ſhould excuſe the greater part of the ground of that parjiſh from paying tithe herbage.

2*dly*, It ſeems to me a material objection againſt the cuſtom, that foreigners living out of the pariſh, though they have no privilege of being tithe-free as to their herbage, yet have made the tithe graſs into hay, which looks as if it was the uſage of that pariſh for the pariſhioners to make their graſs into hay of courſe.

3*dly*, It ſeems material what ſome of the witneſſes have proved, that in this pariſh the pariſhioners, when they cut down the graſs, did not divide it into ten parts, until ſuch time as they had made it into hay; for of conſequence the parſon could not have any opportunity of making his tithe graſs into hay himſelf.

But

But, 4*thly*, It being objected, that the consideration of making the tithe grass into hay for the benefit of the rector, could be no consideration as to the vicar, who was intitled to the small tithes of herbage:

Lord Chancellor;

A *modus* in relation to the tithes due to the parson, may be a good bar to the payment of a small tithe, due to the vicar, because all the tithes did not at first belong to the parson, during which time he might agree to this *modus*.

That * is nothing; for originally and of common right the parson was intitled to all the tithes, as well small as great, and the *modus* (supposing it to be a good one) must have been time out of mind, and consequently must have begun, while the parson was seised of the small, as well as of the great tithes, and when afterwards the vicarage was derived out of the parsonage, and the parson by consent of the patron and ordinary endowed the vicar *with these* small tithes, this shall not prejudice the parishioners, or deprive them of the benefit of enjoying their *modus*, which they before were intitled to.

5*thly*, It was objected, that the parishioners *de jure* ought to make the tithe grass into hay.

Parishioners only bound to cut the grass, and to lay it into heaps or cocks, but not bound to make it into hay.

But Lord Chancellor declared the law to be otherwise, and interrupted the counsel when they began to speak to this, saying, that all the parishioners were bound to do was, to cut down the grass, and divide it into ten parts, after which the † parson was to make it into hay; and that this had been so re-

* See for this in *Yelverton* 86. *Cro. Jac.* 116. *Green* against *Austin*; but see also 3 *Bulst.* 220. *Wintall* against *Child*, and 2 *Keb.* 212. *Brown* against *Haywood*, contra.

† See 1 *Roll. Abr.* 644. Accord. But see also 1 *Roll. Rep.* 172. contra; and note, the tithes are called the tithes of hay, and not of grass.

solved

ſolved in a *Devonſhire* caſe (the caſe of one *Reynolds*, 11 *Jac.* 1.); however, in regard foreigners, having meadow land in this pariſh, made their tithe graſs into hay as well as the pariſhioners, and yet paid tithe of the herbage; and by reaſon of the other objections above-mentioned, it would be too much in a court of equity to eſtabliſh this *modus*, eſpecially where it was inſiſted upon (as in this caſe) that the pariſhioners making tithe graſs into hay, did not only excuſe the herbage of that ground from tithe herbage, but alſo the tithe herbage, that the pariſhioners were to pay for any land he depaſtured within the pariſh, though it might be a great parcel of paſture land, and though the ſame might be fed all the year.

Diſmiſs the bill with coſts; but without prejudice as to any litigation, that may be made touching the ſame at law.

May 13, A. D. 1729.

In the *Exchequer*.

Taylor, Clerk, againſt *Walker*.

BILL was preferred by plaintiff, as rector of *Checkley*, in the county of *Stafford*, for tithes of five cloſes, in that pariſh, in the defendant's poſſeſſion.

New trial granted upon an iſſue to try a *modus*, becauſe the judge miſcorrected the jury. *Bunb.* 267. pl. 344.

The defendant by his anſwer inſiſted, that there was a *modus* of three ſhillings and four-pence, in lieu of all tithes, ariſing on the ſame cloſes, and that no tithes in kind were ever paid.

Upon

Upon the hearing, the court directed an iſſue to try the *modus*, and upon the trial it appeared in the evidence, that this *modus* was payable, not only for the five cloſes, but two cloſes more, particularly named. Mr. Juſtice *Probyn*, upon this evidence (at *Stafford*) directed the jury, who accordingly gave a verdict for the plaintiff againſt the *modus*.

Now, upon the return of the *poſtea*, it was moved for a new trial; for that this being an iſſue to inform the conſcience of the court, the defendant ought not to be held ſo ſtrictly, eſpecially ſince no proof of tithes in kind being paid, was given; and therefore though it extended to two cloſes more, yet it was leſs than really the preſcription was, which he inſiſted on, and therefore he ought to have had the benefit of the proof, as to five cloſes only.

For the plaintiff it was inſiſted, that a *modus* ought to be certain, being in bar of common right, and therefore he has failed in the defence he inſiſted on; and Mr. Juſtice *Probyn*'s opinion, as certified by Baron *Hale*, was relied on; but, *by the whole court*, a new trial was granted; and they ſaid, they could not diſtinguiſh this from the caſe of a prohibition.

A. D.

A. D. 1729.

In the *Exchequer*.

John Fox, Clerk, - - Plaintiff.

Mary Bardwell, *James Balls*, *Thomas Buttrice*, *Francis Porter*, and *William Rix*, } Defendants.

Subſtance of the plaintiff's bill, and of the defendant's anſwer. 4 *Brown*, 220.

THIS term the plaintiff, as vicar of *Lakenham*, preferred a bill in the court of *Exchequer*, againſt the defendants, as occupiers of the demeſne lands of the manor of *Lakenham*, from *Michaelmas*, 1727, to *Michaelmas*, 1728, to compel payment of of all manner of tithe (except corn and grain), and ſtated in his bill the decree made in the caſe of *Folchier* againſt *Ward*, [which ſee under *Eaſter* Term, *Will.* III.]

The defendants anſwered the plaintiff's bill, and inſiſted upon the lands in queſtion being not liable to the payment of vicarial tithes to the plaintiff, and ſet forth the exemption as before * mentioned, and that the lands in their reſpective occupations were let to them tithe free, and were known ſo to be; that the occupiers of the manor houſe uſually heard divine ſervice at *Lakenham* church, and frequently gave the miniſter ten ſhillings, as a free gift, or offering, who accepted the ſame in a thankful manner, know-

* In the cauſe between *Folkbier* and *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* and *Bardwell*; and *Bardwell* and *Fox*, under *Eaſter* Term, 8 *Geo.* II.

ing

ing no tithes were due; and as to the decree obtained by *Folchier* againſt *Ward*, it appeared by *Ward's* anſwer, that he inſiſted, that he never heard tithes were paid for the lands in his poſſeſſion, for that the ſaid lands were part of ſome religious houſe, and diſcharged of tithes; that the ſaid lands belonged to Lord *Berkley*, who, in *February*, 1678, leaſed the ſame to *Ward* for fourteen years; and in 1691, *George Berkley*, Eſq; leaſed the ſaid lands to *Ward*, who then had held them nineteen years, and no tithes were in all that time demanded; that the inheritance of the ſaid lands was in Lord *Berkley*, and *Jeremy Chaplyn*, Eſq; in right of his wife; and that the ſaid *Ward*, being only tenant, could not anſwer as to the right of tithes, without the aid of Lord *Berkley*, and *Chapplyn*, and prayed that they might be made parties.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II. *Fox* againſt *Bardwell*, under *Eaſter* Term, 8 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735, *Bardwell* againſt *Fox*, *May* 7, 1735.

Trinity

Trinity Term, 5 Geo. II.
A. D. 1731.

In the *Exchequer*.

The Hon. *Henry Berkley*, Eſq; *Jane Chaplyn*, widow, *Robert Lackford*, *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Procter*, and *William Rix*, } Plaintiffs.

John Fox, Clerk, and the Dean and Chapter of *Norwich*, } Defendants.

Subſtance of the plaintiff's bill, and of the defendant's anſwer, 4 *Br.* 221.

THE plaintiffs exhibited their bill againſt the defendants *Fox* and the dean and chapter of *Norwich*, ſetting forth among other things, that the defendant *Fox* had extorted ſeveral ſums of money from the plaintiffs the tenants, upon pretence of tithes; and prayed that *Fox* might account for ſuch ſums, and that the plaintiffs might be quieted in the enjoyment of their lands, tithe free, and to eſtabliſh the exemption of the ſaid lands from the payment of tithes.

The defendant *Fox*, in his anſwer to this croſs bill, admitted the ſeiſin of the prior and convent as before * ſtated; the enjoyment of the tithes by them, till their diſſolution, and the leaſes made thereof by

* See the cauſe between *Folkbier* and *Ward*, under *Eaſter* Term, 11 *Wil.* III. *Fox* and *Bardwell*, and *Bardwell* and *Fox*, under *Eaſter* Term, 8 *Geo.* II.

the prior and convent, and alſo by the dean and chapter after the diſſolution; he then ſaid, that he could not find in what year, or by what biſhop, the vicar of *Lakenham* was endowed, nor that any vicar was preſented, or any inſtitution after 1392, till the preſentation of *Wilkinſon*; but believed that the ſaid prior and convent, after the ſtatute of *Edward* the Fourth, ſerved the cure by a chaplain, to whom they paid a ſtipend; and that after the tranſlation of the priory into a deanery, the dean and chapter for ſeveral years, till 1610, provided a chaplain, and paid him a ſtipend; and he admitted to have received ſeveral ſums of money of the plaintiffs the tenants, on account of tithes.

The dean and chapter by their anſwer ſaid, that they could not find any endowment of any *vicarage* of *Lakenham*, or any preſentation thereto, after the year 1386, till the preſentation of *Wilkinſon*.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Wil.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II. *Fox* againſt *Bardwell*, under *Eaſter* Term, 8 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735. *Bardwell* againſt *Fox*, *May* 7, 1735.

Eaſter

Eaſter Term, 8 Geo. II.

April 16, A. D. 1735.

In the *Exchequer*.

John Fox, Clerk, — Plaintiff.

Mary Bardwell, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, } Defendants.

* *And*

The ſaid *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, } Plaintiffs.

The ſaid *John Fox*, Clerk, and the Dean and Chapter of *Norwich*, } Defendants.

THE bill † was by *Fox*, as vicar of *Lakenham*, in the county of *Norfolk*, for the tithe of hay, and all vicarial tithes ariſing on lands in defendant's poſſeſſion, from to *October* 1727 for the year following.

In a ſuit by a vicar, for tithes, the occupiers inſiſted on certain exemptions, but the impropriator, by his anſwer, admits the vicar to be intitled to all tithes, except corn and grain; on this admiſſion the court decreed for the vicar, without hearing the evidence touching the exemption. 4 *Brown*, 216. pl. 27. *Com.* Rep. 498. pl. 213. *Bunb.* 327. pl. 408.

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* On this day both cauſes came on to be heard before the barons of the *Exchequer*, when the counſel for the plaintiffs expecting that the court would do nothing without a trial at law, went no further into the cauſes, than opening the ſeveral pleadings, in order to ſettle a proper iſſue to try the exemption, which was inſiſted on by the plaintiffs *Bardwell*, *&c.* but the court was pleaſed to deny the ſame, and proceeded to the hearing of both the cauſes. 4 *Brown*. 222.

† *Com.* Rep. 498. pl. 213.

And the caſe upon the depoſitions appeared to be this:

The * defendant *Chaplyn*, was tenant for life of the maner of *Lakenham*, and the lands thereto belonging, and of ſome other lands, within the manors and pariſhes of *Eaton*, and *Ameringhale*, in the county of *Norfolk*, the defendant *Henry Berkley* was ſeiſed of the reverſion in fee of the ſaid manor and lands, and the other defendants were tenants or occupiers of the ſaid lands; and all theſe ſeveral manors of *Lakenham*, *Eaton*, and *Ameringhale*, were, at the time of the conqueſt, antient demeſnes lands of the crown, as appears by Doomſday Book.

In the year 1100 King *William Rufus*, and *Henry* the Firſt, granted two of theſe manors, *viz. Lakenham* and *Ameringhale* to God and the church of *Norwich* and *Herbert* then biſhop there, who founded the cathedral church, to hold as freely as in the king's hands, whereupon the Biſhop inſtituted monks in the ſaid church, and granted or appointed the ſaid manors of *Lakenham* and *Ameringhale*, amongſt other manors and lands for the ſupport and maintenance of the ſaid monks, and afterwards King *Henry* the Firſt granted to God and the church of *Norwich* and to *Herbert* the biſhop, and to the monks of the ſaid church, the manor of *Eaton* adjoining to the ſaid manor of *Lakenham*.

King *Henry* the *Second*, King *John*, *Henry* the *Third*, and *Edward* the *Firſt*, by ſeveral charters (all of them reciting the charters of King *William Ru-*

* 4 *Brown*, 216. pl. 27.

fus,

ſus, and *Henry* the *Firſt*, to the Biſhop *Herbert*) confirmed the ſame; as alſo, the ſaid biſhop's grant to the monks, and the ſame was likewiſe confirmed by Pope *Adrian*, in the year 1115, by Pope *Alexander* the *Third*, in the year 1176, by *Gregory* the *Tenth*, in the year 1273, and by ſeveral biſhops of *Norwich*, ſucceeding biſhop *Herbert*; in all which charters and confirmations of the popes and biſhops, the manors of *Lakenham*, and *Amerinhale*, and the churches and tithes were expreſsly mentioned and confirmed.

According to the then conſtitution of the church of *England*, the King and all his ſubjects might give or grant their tithes to what religious houſe or parſon they pleaſed, and ſo it continued till the year 1200, and until that time all patrons of the churches, as well lay patrons as religious, collated their own clerks, that is, by inveſtiture from their own hands, without preſentation or inſtitution; and the religious houſes in general placed a monk of their houſe in their churches, until the pope at his councils, and the national ſynods here, began to forbid the parochial clergy from taking any tithes or churches from the hands of laymen by inveſtiture, without the conſent of the biſhops. And although the King gave ſome allowance to theſe canons, yet the practice of patrons inveſting their clerks in their churches, and diſpoſing of their tithes as they pleaſed, continued until the *Lateran* council, in the year 1215.: then the lay-patrons began to obey thoſe canons, and the religious patrons, where they held manors with tithes, obtained licences from the biſhops, to hold their churches in *proprios uſus*, and to ſerve the ſame by chaplain of their own, removeable at pleaſure. The monks at *Norwich* obtained ſeveral of ſuch licences from *John de Gray*,

biſhop of *Norwich*, to hold ſuch of their churches, of which they had the advowſon and benefice, to their own proper uſes; and particularly the ſaid biſhop *de Grey*, between the years 1200 and 1214, by his charter of appropriation, did appropriate the ſaid church of *Lakenham* to the priory of *Norwich*; and granted licence to the ſaid priory and convent, to enter upon the ſaid church, whenever it ſhould be void, and to cauſe ſervice to be performed therein, by their chaplains, removeable at their pleaſure.

By theſe licences and grants the church of *Lakenham* became united or appropriated to the ſaid priory of *Norwich*, and King *John*, *Henry* the *Third*, and *Edward* the *Firſt*, by their ſeveral grants or charters, confirming to the ſaid prior and monks of *Norwich*, all gifts and liberties whatever, before given or granted to them; by which means they became parſon *imparſonee*, and perpetual incumbent in this church, without inſtitution and induction, and no lapſe could enſue or fall to any ſucceeding biſhop, or to the crown; the crown and biſhops being bound by the ſaid charters.

Several papal orders being iſſued out for the ſupplying parochial churches with ſecular prieſts, the prior and convent of *Norwich*, between the years 1312 and 1386, preſented vicars to *Lakenham*, but never before or after; and allowed to the vicar officiating a ſtipend of forty ſhillings a year, but never endowed the vicar of any part of the profits of the church; and to avoid endowing the vicarage, the ſaid prior and convent from the year 1386, to the diſſolution of the priory, ſerved the ſaid church by a chaplain, which was uſually one of their own houſe, removeable

able at pleaſure; ſo that from 1386 to 1610, being two hundred and twenty-four years, no vicar was inſtituted in the ſaid church; the cure being conſtantly ſerved by chaplains.

During ſuch time as the priory ſubſiſted, the prior and convent held the ſaid manor and rectory of *Lakenham*, with all the tithes of the ſaid pariſh, and frequently leaſed the ſame, with the tithes thereof, to tenants, who held and enjoyed accordingly.

But this priory was, in the 30th year of King *Henry* the *Eighth*, diſſolved, and by the act of the 31ſt of that King for the diſſolution of the abbeys and monaſteries, it was enacted, "That all lands, tenements, and tithes, ſhould be veſted in the King, and his heirs, in the ſame ſtate and condition, as the abbots and priors held the ſame, and diſcharged of and acquitted from the payment of tithes, as the abbots and priors held the ſame." Stat. 31. *Hen.* VIII. chap. 13.

King *Henry* the *Eighth* by letters patent, bearing date the ſame year, changed the ſaid priory, and founded a dean and chapter in the ſaid church, and granted to the ſaid dean and chapter, the manor of *Lakenham*, and the demeſne lands with the tithes thereof, and all privileges thereto belonging, or therewith held and occupied, in as large and ample a manner, as the ſaid prior and convent held the ſame; and accordingly the ſaid dean and chapter, and their tenants, farmers and occupiers of the ſaid lands, held and enjoyed the ſame, freed and diſcharged of all manner of tithes whatſoever.

The ſaid dean and chapter being thus ſeiſed of the ſaid manor and demeſne lands, and the tithes thereof,

with rectory of *Lakenham*, by their deed under their common ſeal, dated the 1ſt of *June*, 1ſt of *Edward* VI. ſurrendered the ſame (amongſt other things) to the ſaid King, who became ſeiſed thereof, acquitted and diſcharged from the payment of tithes, as the dean and chapter had held the ſame.

King *Edward* the *Sixth* by his letters patent, bearing date the 9th of *November* following, did refound the ſaid dean and chapter, and granted them ſeveral manors and lands, but reſerved and excepted thereout the ſaid manor of *Lakenham*, and the demeſne lands, and all the tithes thereof, as then to fore held, uſed, demiſed, or leaſed: and by letters patent, dated the 1ſt of *July*, in the ſeventh year of his reign, granted the ſame to *Thomas Greſham*, *Eſq*; by the name of the manor of *Lakenham*, and all lands, meadows, paſtures, feedings, woods, tithes of corn, hay, hemp, and all tithes whatſoever, in *Lakenham*, *Trowſe*, and *Bracondale*, to the ſaid manor and lands any wiſe belonging, or therewith uſed, held or reputed. And under this *Thomas Greſham*, Eſq. Mr. *Berkley*, and Mrs. *Chaplyn*, were intitled to the inheritance, and freehold of the ſaid manor lands and tithes.

The ſaid dean and chapter under the charter of the 9th of *November*, 1ſt *Edward* VI. being intitled to the rectory of the church of *Lakenham*, and all tithes in the ſaid pariſh of *Lakenham*, (except the manor and demeſne lands) ſerved the cure at *Lakenham*, by a chaplain, to whom they paid yearly a ſtipend, and continued ſo to ſerve the ſaid cure till the year 1610: at which time one *Wilkinſon*, pretending that *Lakenham* was a vicarage lapſed to the crown,

crown, obtained a preſentation thereto, and had inſtitution thereon; but the rectory and the tithes there, belonging to the dean and chapter being then under a leaſe made by the dean and chapter, in the 12th year of Queen *Elizabeth*, to one *Layer*, for threeſcore and ten years, which did not expire till 1640. *Wilkinſon* could get no tithes, ſo that he reſigned in 1612, and in 1625 the dean and chapter, inſtead of appointing a chaplain or curate, preſented one *Smith* to the church of *Lakenham*, and the ſaid leaſe to *Layer* being in ſome ſhort time after ſurrendered to the dean and chapter, they permitted the ſmall tithes belonging to them, to be taken by their new vicar, in lieu of the ſtipend paid by them to their curates or chaplains.

After the death of *Smith*, the dean and chapter preſented other clerks to the ſaid church, when vacant, as a vicarage, and permitted them to receive the ſmall tithes belonging to the dean and chapter; whence it came to be inſiſted upon, that the vicar of *Lakenham* was intitled to all ſmall tithes within the ſaid pariſh, as a vicarage endowed; when in fact there never was any endowment of a vicarage, otherwiſe than by permiſſion of the dean and chapter aforeſaid, but if ſuch permiſſion was to be conſidered as an endowment by the dean and chapter, it could extend to no other tithes than what the dean and chapter were intitled to.

It does not appear any vicar was inſtituted, till the year 1610, but that ſince then *Smith* and others have been inſtituted vicars, and Sir *Nevil Catlin*, his father and grandfather, held *Lakenham* farm, as aſſignees of the leaſe made to ——; that *Tuck*, *Wright*, *Ward*, Com. Rep. 502.

Ward, *Armiger* and *Revier* were tenants under the *Catlins*, of the ſaid farm; that the common reputation has been, that the vicars of *Lakenham* have been intitled to all the tithes of *Lakenham*, except the tithes of corh.

That the tithes have been paid by the owners and occupiers of this farm to the vicars, or a compoſition for them which was uſually eight pounds a year, that *Richard Catlin*, father of Sir *Nevil*, paid ſo in lieu of vicarial tithes to *Smith* the vicar. That *Tuck*'s father held the farm ſeveral years and paid ſo, that *Wright* for many years did the ſame; that *Ward* refuſed to pay, on which *Smith*'s widow ſued him in the *Exchequer*, and had a decree 9 *W.* III. to pay tithes in kind, [See *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III.] and being informed *Richard Catlin* had paid forty ſhillings quarterly, on recommendation of the court the plaintiff accepted eight pounds a year, and *Ward* paid it for time paſt, and all the time after he held the ſaid farm.

That *Wright*, *Richard Catlin* and his father, paid ſo, that *Tuck* and his father paid ſo, that *Armiger* and *Merſer* paid ſo ſix or ſeven years; that his father at firſt paid but five or ſix pounds a year, for two or three years, but hearing eight pounds yearly had been paid, agreed to pay ſo, but only five pounds a year to *Harwood*, who was an eaſy man, and payment by *Tuck*, *Wright*, and *Ward*, was confirmed. Books of *Richard Catlin* contain entries of his payments *anno* 1632 and 1635.

And two decrees for payment 9 *W.* III. and *Trin.* 8 *Geo.* I. were read, the laſt of which was againſt *Bardwell*, now defendant, and *Ward* his tenant, and

Reb. Ward his wife ſaith her huſband paid twenty pounds for the tithes of the year 1720, and twenty-two pounds for tithes of the year 1721, and by reports in the laſt cauſe 15 *April*, 1725, defendant was reported indebted twenty pounds for tithes of the year ——; and decreed to pay that ſum and coſts.

On the defendant's part they produced, beſide the charters and grants above, a leaſe 14 *October*, 34 *Hen.* VIII. from the dean and chapter of *Norwich* to *Lawrence Stiſtead* for fifty years of the tithes of all corn belonging to the parſonage there, except the tithes of corn, hay, tack and hemp belonging to the manor of *Lakenham*, wherein is recited a leaſe from the prior and convents of *Norwich*, for twenty years, to *Robert Pictoe* dated 10 *November* 27 *Hen.* VIII.

This leaſe to *Stiſted* was aſſigned to *Thomas Pictoe*, and on his ſurrender by indenture 12 *April*, 1 *Eliz.* the dean and chapter demiſed to *Pictoe* the tithes of corn in *Lakenham*, belonging to the parſonage there (except as before) for eighty years from *Michaelmas* laſt.

On ſurrender of this leaſe by indenture 20 *December*, 8 *Eliz.* the dean and chapter demiſed the ſame to *Edmund Dean*, who was aſſignee of —— *Scrivens*, aſſignee of *Thomas Pictoe* for ſeventy-three years.

By indenture, 14 *February*, 12 *Eliz.* the dean and chapter on ſurrender of the laſt leaſe demiſed to *Lane* for ſeventy years.

It appears *Lakenham* farm is part of the demeſnes of the manor of *Lakenham*, and conſiſts of thirty acres

port of the words, it ſeems rather to infer the contrary. It is very likely the prior and convent, when they leaſed out any part of their lands, leaſed them free from payment of tithes, in order to gain the higher rent; and therefore in the leaſe of the manor of *Lakenham*, or any part of the demeſnes, they exempted them from paying any predial or perſonal tithes; but this was an exemption that was not inherent in the lands, but was the effect of their covenant to excuſe them; when, therefore, the covenant in the leaſe, 33 *Hen.* VIII. excuſed only the tithes of the cattle agiſted on the demeſnes of the manor, that was not equivalent to what the former tenants were excuſed from; and therefore in the leaſe 1 *Edw.* VI. it was declared the meaning was to excuſe him from all predial *and perſonal tithes, but* not from all tithes whatſoever; and therefore the predial tithes only were demiſed to *Flint* for ninety-nine years; but all mixed tithes, with which the vicar is uſually endowed, were ſtill payable by him; the covenant to diſcharge all tithes, was meant only to exempt them from the tenths payable by ſtatute 27 *Hen.* VIII. chap. 20. and not to excuſe from any other tithes.

2. But the thing mainly inſiſted on is, that by letters patent, 7 *Edw.* VI. the King grants to *Thomas Greſham* the manor of *Lakenham* *, *ac totam rectoriam & eccleſiam de* Lakenham, *ac advocationem & jus patronatuus vicariæ eccleſiæ ibidem, ac omnia meſ-*

* And all the rectory and church of *Lakenham*, and the advowſon and right of patronage to the ſaid vicarage and church, and all meſſuages, &c. glebe tithes, in *Weſtacre*, *Lakenham*, &c. to the ſaid manor, churches, or to either of them belonging.

ſuagia,

ſuagia, &c. *glebas*, *decimas*, *in* Weſtacre, Lakenham, *&c. dict' manerr' eccleſiis ſeu alicui ſpectan.* &c.

Whence it is inferred, that the plaintiff, collated to the vicarage, by the dean and chapter, can have no right to the tithes, at leaſt not the tithes ariſing from the manor of *Lakenham*.

And although it was anſwered, that by the letters patent, 1 *Edw.* VI. the King had granted the rectory of *Lakenham* and advowſon of the vicarage to the dean and chapter, and conſequently the ſubſequent grant to *Thomas Greſham* is void; yet it was urged, that in that grant there is an exception of all tithes in *Lakenham*, to the manor of *Lakenham* belonging, as therefore the demeſnes of *Lakenham* have always been reputed exempt from tithes, and it came to the crown tithe free, and thoſe tithes by this charter are granted to *Thomas Greſham*, the plaintiff cannot be intitled to them.

But it is evident by what is before ſaid, that the manor of *Lakenham*, and other poſſeſſions of the prior and convent of *Norwich*, came not to the crown by the *ſtatute* 31 *H.* VIII. chap. 13. but were in the crown before, either by ſurrender of the prior and convent, or by the ſtatute 27 *H.* VIII. and conſequently did not come to the crown tithe free; but in reality, although the manor of *Lakenham* and the rectory of *Lakenham* had been long united, upon the ſeverance of them the right of tithes revived; when therefore King *Edw.* VI. in the firſt year of his reign granted to the dean and chapter of *Norwich* the rectory of *Lakenham*, all the tithes in the pariſh of *Lakenham* became due to the dean and chapter, as well

thoſe

thoſe ariſing out of the demeſne of the manor, as elſewhere; and the exemption doth not extend to any tithes, parcel of that rectory; but firſt, the King having granted ſeveral manors, rectories, and all other hereditaments in *Lakenham*, or elſewhere in the county of *Norfolk*, which heretofore belonged to the cathedral church of *Norwich*, he excepts out of this grant the manor of *Lakenham*; but this amounted not to exception of the rectory (if it had been appendant to the manor, as it was not) becauſe the rectory was expreſsly granted away before: then he excepts all tithes to the manors of *Hemilby*, *Lakenham*, and rectory of *Hemelby*, *aut eorum alicui ſpectan'*; but this doth not except the tithes of the demeſnes of *Lakenham*, which were not belonging to the manor, but to the rectory of *Lakenham*; for the tithes are collateral to the land; beſides, it does not import any tithes belonging to the manor, for it comes in with general words belonging to the manor or rectory of *Hemelby*, or any of them, ſo that it excepts not any tithes belonging to the manor, unleſs it otherwiſe appear there were any ſuch. The next branch of the exception, indeed, ſeems to import, that there were tithes belonging to the manor, ſince it excepts all tithes in *Eaton*, aſſigned to the manor of *Lakenham* out of the manor of *Eaton*, and out of the manor of *Ameringhale*, now in the tenure of *Robert Flint*; and it ſeems probable there might be ſome portion of tithes granted before the council of *Lateran*, out of *Eaton* and *Ameringhale*, and annexed to the manor of *Lakenham*, becauſe in the leaſe to *Stiſted*, 34 *Hen.* VIII. of the tithe corn belonging to the parſonage of *Lakenham*, there is an exception of the tithe of corn, hay, tack and hemp, belonging to the manor of *Lakingham*, which were probably excepted out of *Stiſted*'s leaſe, becauſe they were before demiſed to *Flint*;

Flint; and perhaps by the leaſe of the ſite of the manor of *Lakenham*, 33 *Hen.* VIII. and 1 *Edw.* VI. and the demeſne lands, they might be thought to be comprehended in the general words; but whether they were in the tenure of *Flint*, by thoſe leaſes, or any other, the exception of the tithes being in *Eaton*, * & *aſſignat'* & *appunctuat' manerio de* Lakenham, *extra maner' de* Eaton, & *maner' de* Ameringhale, cannot except the tithes ariſing out of the demeſnes of *Lakenham*, and belonging to the rectory of *Lakenham*.

And if thoſe tithes be not excepted out of the grant 1 *Edw.* VI. they cannot paſs to *Thomas Greſham* by the grant 7 *Edw.* VI. they cannot paſs as a part of the rectory, being granted 1 *Edw.* VI. to the dean and chapter, could not paſs by the grant, 7 *Edw.* VI. for the King was deceived, and his grant to *Thomas Greſham*, as to the rectory of *Lakenham*, and the advowſon of the vicarage, and the tithes, belonging to the church of *Lakenham* is void; it may poſſibly ſtand good, as to any tithes in *Eaton*, or aſſigned out of the manor of *Eaton* or *Ameringhale*, to that of *Lakenham*.

I need not cite caſes, to ſhew, that an exception doth not extend to exclude out of a grant, what is expreſsly granted, 2 *Rol.* Ab. 454. *f.* 8. A man ſeiſed of the manors of *C.* and *D.* of which *Blackacre* is part of the manor of *C.* but lies near *D.* and is enjoyed with and reputed parcel of *D.* he grants the manor of *C.* and all lands reputed parcel of it, except the manor of *C. Blackacre* is not excepted, being expreſsly

* And aſſigned and appointed to the manor of *Lakenham*, out of the manor of *Eaton* and manor of *Ameringhale*.

granted as a parcel of the manor of *D.* under the words all lands reputed parcel of that manor.

Suppoſe King *Edw.* VI. had granted to *Thomas Greſham* the manor of *Lakenham*, the rectory of *W.* and all the lands, tithes, *&c.* to the ſaid manor and church, or either of them belonging, and after granted to the rectory of *Lakenham*, * *cum omnibus juribus membris, & pertin' dict' eccleſiæ Cath' dudum ſpectan'*. I apprehend the tithes of demeſnes of the manor belonging to the rectory would have paſſed to *Greſham*; it would be like the caſe, *Mo.* 426. where the abbot of *Abbington* ſeiſed of the hundred of *H.* and the leet belonging and the other lands, which came to the crown on the diſſolution, the King gants to one *Lions*, part of *thoſe lands*, and all the leets *infra præmiſſa*, and after grants the hundred of *H.* and leet belonging, to Lord *Norris*; it was held the leet paſſed by the laſt, not by the firſt grant.

Thirdly, But in the laſt place it is ſaid, that here was never any vicarage endowed, for the cure was ſupplied by the monks who had a ſalary allowed them, and conſequently the plaintiff cannot recover, for the vicar cannot be intitled to tithes, unleſs endowed of them, and the endowment muſt be proved by an endowment produced, or elſe by preſcription; but here is not any endowment produced, and can be no preſcription, becauſe it was ſhewn when there was none; for no pretence of any vicar, or tithes paid to him, till the year 1610.

But it was anſwered, it may be difficult always to ſhew the exact time, when a vicarage firſt commenced, or when it was firſt endowed.

* With all rights, members, and appurtenances, to the ſaid church of *Saint Catharine*, lately belonging.

By

By the conſtitution of *Ottoboni*, 21 *Apr.* 52 Hen. III. * *univerſi religioſi, qui eccleſias in proprios uſus habent, ſi vicarii non ſunt poſiti in eiſdem infra ſex menſium ſpatium, vicarios dioceſani præſentare non omittant, quibus ſufficienter pro facultate eccleſiarum aſſignent portionem, alioquin dioceſani id facere ſtudeant.*

Therefore though the church of *Lakenham* was appropriate before the ſtatutes 15 *Rich.* II. and 4 *Hen.* IV. chap. 12. which require that on appropriation, care be taken there ſhould be a vicarage endowed, or otherwiſe the appropriation ſhall be void; and it was inſiſted, that thoſe ſtatutes extend only to the time future, and conſequently on this appropriation there might be no endowment of a vicar; and it is moſt probable it was not, becauſe the monks ſupplied the cure till the diſſolution, and had no tithes, but an annual penſion; yet it appears by this conſtitution, the religious were obliged to create a vicar and endow him, otherwiſe the biſhop was required to do ſo; and this conſtruction extends to all precedent appropriations, and therefore the preſumption is, that there was a vicar endowed, purſuant to this conſtruction.

How the cure came after to be ſupplied by their own monks does not appear; perhaps thoſe monks might be preſented and inſtituted, though they are called *capellani*, or perhaps the pope might by bull allow the prior to appoint one of his monks to officiate, and ſerve the cure, as in the caſe of *Briton* and *Wade*. *Cro. Jac.* 515.

* Let the religious of all orders, who have churches for their own uſe, in caſe vicars are not appointed to them, within the ſpace of ſix months, preſent vicars to the dioceſan, for whom let there be a ſufficient proviſion made, according to the revenues of the churches, otherwiſe let the dioceſans themſelves endeavour to do it.

The prior of *Deintree* had the advowſon of *Norton* appropriate, and the vicarage was endowed with the altarage and ſmall tithes, and ſo continued till the reign of *Henry* the *Sixth*, when on petition of the prior to the pope, in regard the priory was poor, the pope granted *quod de cætero*, the prior ſhould conſtitute one of his monks to officiate in the cure, and ſo it continued to the diſſolution, but held this did not diſſolve the vicarage.

It is true, this was an endowment after the ſtatute 4 *Henry* the *Fourth*, but though this was a reaſon given, that the pope could not diſſolve a vicarage after that ſtatute, yet it was alſo reſolved, that it could not be done by the pope, though the ordinary might do it.

It is ſure the vicarage of *Lakenham* is mentioned in the patents, 1 *Edward* the *Sixth*, and 7 *Edward* the *Sixth*, ſo that the church was looked upon to have a vicarage then.

And though it does not appear how the endowment originally was, it is ſure they were often times uncertain and variable.

At firſt the endowment might be ſmall, and after enlarged. *Seld.* of tithes, iii. 1262, ſaith, ſpeaking of the firſt appropriations,

Nor was there any perpetual certainty of the profits of their preſentee (that is the perſon, the appropriate perſon preſented to any vicarage) till the monks by compoſition with the ordinary, or by their own ordinance (which preſcription was after confirmed) appointed ſome yearly ſalary in tithes or glebe,

glebe, or rent, for the perpetual maintenance of the cure; which ſalaries became afterwards the endowments of perpetual vicarages.

Crimes & al' againſt *Smith*, 12 *Co.* 4. in the *Exchequer*. The caſe was, the abbot of *Salby* held the parſonage of *Lubbenham*, in the county of *Leiceſter* as appropriate, which came to the crown by ſtatute 31 *Henry* the *Eighth*, who in the thirty-ſeventh year of his reign granted it in fee-farm, under which the plaintiff claimed; the defendant got a preſentation from Queen *Elizabeth* to this church, and inſiſted, that the impropriation was made 22 *Edward* the *Fourth*, and no endowment of a vicarage, and conſequently the appropriation void; and there was no inſtrument or direct proof of any endowmeut; but ſince, during the appropriation ſuppoſed, there had been a vicar inducted, as a vicar rightfully endowed, it was reſolved by the court, that the vicarage, in reſpect of its continuance, was rightfully endowed.

And the court ſaid, it would be dangerous to examine into the original of impropriations of parſonages, and endowments of vicarages.

In the preſent caſe, there is a proof of payment of vicarial tithes to the vicar, for near one hundred years, while *Richard Catlin*, *Tuck*, *Wright*, *Ward*, *Armiger*, *Menſor*, held this farm, and a conſtant reputation, that all the tithes but of corn belonged to the plaintiff; and two decrees of this court in his favour, which raiſes a ſtrong preſumption for him.

It is poſſible the endowment at firſt was but ſmall; that ſome penſion was paid to the incumbent; that when the dean and chapter had the parſonage, they

might vary or augment the endowment of the vicarage. In *Flint*'s leaſe, 33 *Henry* the *Eighth*, the demiſe of predial and perſonal tithes only, looks like a reſervation of the reſt for the vicar; and the preſcription, which is evidence of an endowment, need not to be ſuch as admits no proof when it was not paid; for the endowment may be within time of memory, but a preſcription allowed by the canon law of ſixty years, or thereabouts, a time ſufficient to induce a belief, that there was ſome foundation for the payment, though it does not exactly appear when ſuch payment began. Beſides there was on the 6th of *November*, 1735, to which time the debate of the cauſe had been put over, further evidence given of ſeveral preſentations by the dean and chapter to the vicarage, and the vicars inſtituted thereon, ſome of which were ſaid to be in purſuance of the conſtitution of *Ottoboni*.

The firſt inſtitution was 1312, which were followed by others, 1327, 1359, 1361, 1375, 1386.

Anno 1569, there was a ſequeſtration granted to the profits of the vicarage by the biſhop, in order to ſupply the cure in the vacancy; and, *anno* 1610, there was a preſentation again.

Beſides, there were produced accounts of the chamberlains or treaſurers of the priory, in the time of *Richard* the *Second*, and *Henry* the *Sixth*, wherein he accounts for five ſhillings * *de terris pertinen' vicario de Lakenham*; 41 *l.* 4 *s.* 4¾ *d.* *de eccleſiâ de Laken-*

* For lands belonging to the vicarage of *Lakenham*, forty one pounds four ſhillings and four pence, three farthings, for the church of *Lakenham*; fourteen pounds for the manor, with the tithes; and 19 *Rich.* II. twenty pounds for the manor, and four pounds for the tithes.

ham;

ham; 14 *l. de manerio, cum decimis*; *et* 19 *Rich.* II. *de manerio* 20 *l. de decimis* 4 *l.*

It was further proved, that the reputation was, that the vicar had the tithe-hay, as well as other vicarial tithes, and that the payment of the eight pounds yearly by *Catlin*, *Wright*, *&c.* was reckoned to be for the tithe of hay, clover, turnips, and all other ſmall tithes, and that the tithes had been once paid in kind to the vicar.

It was further inſiſted, that the vicarage or rectory of *Lakenham* came not to the crown, either by the ſtatute 31 *Hen.* VIII. chap. 13. or 27 *Hen.* VIII. chap. 20. but the King, 30 *Henry* the *Eighth*, tranſlated the priory and convent to a dean and chapter, and transferred the poſſeſſions of the priory to the dean and chapter; ſo that theſe poſſeſſions not being ſurrendered to the crown, nor veſted in the crown by any act of parliament, there could not be any exemption from tithes; for unity of poſſeſſion cannot be an exemption longer than the unity continues; and it is only by force of penning the clauſe in the ſtatute 31 *Henry* the *Eighth*, that the lands given to the crown, by that ſtatute, are diſcharged, where there had been a perpetual unity, till the diſſolution by that ſtatute.

And the court was of opinion, that the unity of poſſeſſion of the manor and rectory of *Lakenham*, in the hands of the prior and convent, and after, of the dean and chapter of *Norwich*, till 1 *Edward* the *Sixth* did not exempt the demeſnes of the manor from tithes, when they came to be ſevered.

That by the letters patent, 9 *November*, 1 *Edward* the *Sixth*, the rectory was granted to the dean and

chapter of *Norwich*, and conſequently the grant of it by the patent 7 *Edward* the *Sixth*, to *Thomas Greſham*, Eſq; was void; and although there was an exception in the grant, 1 *Edward* the *Sixth*, of the manor of *Lakenham*, rectory of *Hemilby*, *&c.* and all lands, tithes, *&c.* to the ſaid manors, rectory, *or to any of them, in any manner belonging*, that did not except any tithes, parcel of the rectory of *Lakenham*, which were before expreſsly granted to the dean and chapter, much leſs the tithes belonging to the vicarage

That the reputation of tithes of hay, and all vicarial tithes belonging to the vicar, and the payment of them by the reſt of the pariſh, and the payment of the eight pounds yearly, or ſome other ſum, as a compoſition for them by the owners and occupiers of *Lakenham* farm, above one hundred years, and the two former decrees in favour of the vicar, was a ſufficient evidence of ſome antient endowment.

And the court, † without reading the depoſitions of any of the witneſſes, ‡ thinking that the dean and chapter having ſaid in their anſwer, that the vicars had been intitled to all tithe, except corn and grain, was ſufficient evidence to ſupport the vicar's right to hay, without putting him to further proof of having received it, decreed that the ‖ defendants § *Bardwell*, *Balls*, *Buttrice*, *Procter*, and *Rix*, ſhould account for, with the plaintiffs, and pay the tithes demanded by the original bill, with coſts; and that * the defendant's croſs bill ſhould be diſmiſſed with coſts.

† 4 *Brown*, 221. ‡ *Bunb.* 327. pl. 408. ‖ *Com.* Rep. 512.
§ 4 *Brown*, 221. * *Com.* Rep. 512. 4 *Brown*, 221.

See

See the caſes of *Folkbier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735. *Bardwell* againſt *Fox*, *May* 7, 1735. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II.

Hilary Term, 7 Geo. II.

A. D. 1734.

In the *Exchequer*.

The Honourable *Henry Berkley*, Eſq; *Jane Chaplyn*, Widow, *Robert Lackford*, *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, } Plaintiffs.

John Fox, Clerk, and the Dean and Chapter of *Norwich*, } Defendants.

Ex parte the Plaintiffs.

THE plaintiffs petitioned the court for a rehearing, in hopes of either eſtabliſhing their exemption upon evidence, or of laying a foundation for directing an iſſue at law, or at leaſt of having their evidence heard, in order to enable them to appeal upon the merits; but the court thought proper to refuſe a rehearing, becauſe application was not made for that purpoſe, within ſix months after pronouncing 4 *Br.* 221.

nouncing the decree, although the decree was not then paſſed.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II. *Fox* againſt *Bardwell*, under *Eaſter* Term, 8 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735, *Bardwell* againſt *Fox*, *May* 7, 1735.

May 7, A. D. 1735.

In the Houſe of Lords.

The Honourable *Henry Berkley*, Eſq; *Jane Chaplyn* Widow, *Robert Lackford*, *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, - - } Appellants.

John Fox, Clerk, and the Dean and Chapter of *Norwich*, } Reſpondents.

Decree diſmiſſed. 4 *Br.* Ap. in Parl. 221.

THE appellants appealed, inſiſting, that tho' vicars might have been anciently inſtituted in the church of *Lakenham*, yet no vicarage being endowed, they were not intitled to any tithes, for tithes are not due of common right to a vicar; and in the preſent caſe, there was not the leaſt evidence of any endowment, neither was there any proof of the payment of tithes, by the occupiers of the demeſne lands, till *Ward* was forced to it by *Folchier*, by a decree made upon a miſtake, and improper defence,

ſence, and in a ſuit to which the owners of the inheritance were not parties, and who ſhould not therefore be bound by any decree, that the title of the appellants to the exemption inſiſted on, depending upon old records and other written evidence, and alſo upon great variety of facts, which they were ready to make out, and ſtrongly inſiſted to try by a proper iſſue at law, the right was now, in effect, determined againſt them, without an hearing.

On the other ſide it was argued, that as the vicarage ſtill ſubſiſted, the abuſe practiſed by the prior and convent in keeping it vacant by not preſenting, could not prejudice the rights of the vicarage, when the ſame became full; that the ſurrender of the dean and chapter to King *Edward* the *Sixth*, though it might have veſted in the crown the manor and demeſne lands, and the tithes of corn, to which the dean and chapter were entitled, as impropriators, yet it could not affect the rights belonging to the vicarage; that the general right being with the reſpondents, it was incumbent on the appellants, at hearing of the cauſes, to have proceeded and laid before the court the evidence of their pretended exemption, and which, in all probability, they would have done, had they thought the ſame ſufficient, or in any degree ſtronger than the evidence in the two former cauſes, wherein decrees had been pronounced in favour of the vicar and his leſſee; but as the appellants did not offer any evidence to this purpoſe, it was agreeable to the conſtant and known practice of the court, to decree according to the general right, wherever perſons claiming an exemption, give no evidence in ſupport of it, and therefore it was hoped, that the decree would be affirmed, and the appeal diſmiſſed with exemplary coſts.

But

Decree reverſed, Lords Journ. XXIV. 545.

But after hearing counſel on this appeal, it was ordered and adjudged, that the decree and order of diſmiſſion therein complained of, ſhould be reverſed; and it was further ordered, that the ſaid court of *Exchequer* ſhould proceed to hear the cauſes, upon the pleadings and proofs taken therein.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II. *Fox* againſt *Bardwell*, under *Eaſter* Term, 8 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735. *Bardwell* againſt *Fox*, *May* 7, 1735.

Michaelmas Term, 8 Geo. II.

November 6, A. D. 1735.

In the *Exchequer*.

John Fox, Clerk, and the Dean and Chapter of *Norwich*, } Plaintiffs.

The Honourable *Henry Berkley*, Eſq; *Jane Chaplyn*, Widow, *Robert Lackford*, *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, - - } Defendants.

An old decree for payment of tithes, is evidence of a vicar's right, though no endowment can be ſhewn, nor any proof made of payment, in purſuance thereof. 4 *Brown*, 235. pl. 30.

IN purſuance of the order made on the former appeal, on 7 *May*, 1735, theſe cauſes were, on 6 *November* 1735, heard upon the pleadings and proofs

proofs, when the court again decreed, that the defendants, the tenants, ſhould account for, and pay the tithes, as demanded by the original bill, with coſts, and diſmiſſed the croſs bill, with coſts.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Berkley* againſt *Fox*, *March* 18, 1735. *Bardwell* againſt *Fox*, *May* 7, 1735.

March 18, A. D. 1735.

In the *Houſe* of *Lords*.

The Honourable *Henry Berkley*, Eſq; *Jane Chaplyn*, Widow, *Robert Lackford*, *Mary Bardwell*, *James Balls*, *Thomas Buttrice*, *Francis Proctor*, and *William Rix*, - - } Appellants.

John Fox, Clerk, and the Dean and Chapter of *Norwich*, } Reſpondents.

THE appellants appealed a ſecond time from the decree, ſtating the ſame caſe as before, and inſiſting, that having given full evidence of the exemption, there was a ſufficient foundation for the court, either to eſtabliſh the ſame, or at leaſt to direct an iſſue for trying it; that by the decree the appellants were to account for the tithes of all the lands in their reſpective occupations; whereas it was plainly proved, that ſixty acres, part of

Decree affirmed with coſts. 4 *Br.* Ap. in Parl. 235.

of the lands in the occupation of the appellant *Bardwell*, were part of the manors, and lay in the ſeveral pariſhes of *Eaton* and *Ameringhale*, which had never paid any vicarial tithes, or any compoſition for the ſame, and that about twenty-four acres, other part of the ſaid farm, lay in the pariſh of Saint *Stephen*, in the county of the city of *Norwich*, and there was no proof, that the reſpondent was intitled to any portion of tithes out of lands not within the pariſh of *Lakenham*; that the appellants were to account for the tithes of hay, although the reſpondent had made no manner of proof of any title to ſuch tithes, or that the ſame had ever been taken by the vicar; beſides, the tithe of hay is a great tithe, and not variable; and upon hearing the cauſe of *Folchier* againſt *Ward*, whereon the reſpondent in great meaſure founded his demand of any tithes whatſoever, the then defendant was not to account for the tithes of hay, but by the minutes taken on the hearing of that cauſe, thoſe tithes were expreſsly excepted.

The reſpondent likewiſe ſtated the ſame caſe as before, and in addition to the reaſons there given, it was now ſaid to have appeared upon full proof, at the laſt hearing, and alſo by the proofs in the former cauſe of *Folchier* againſt *Ward*, that valuable compoſitions for the vicarial tithes of *Hall* farm, were peaceably paid to the vicar of the pariſh by the tenants under Lord *Berkley* for many years together; and though diſputes were afterwards raiſed about the ſaid tithes, yet the ſame had been adjudged to the vicar, and his leſſee, by the former decrees.

Com. Rep. 512. 4 *Brown*, 236.

After hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decree therein complained of, affirmed:

And it was further ordered, that the appellants ſhould pay to the reſpondent *John Fox* 200 *l.* for his coſts, in reſpect of the ſaid appeal.

Decree affirmed, Lords Journ. vol. IV. 615.

See the caſes of *Folchier* againſt *Ward*, under *Eaſter* Term, 11 *Will.* III. *Fox* againſt *Bardwell*, under *Eaſter* Term, 3 *Geo.* II. *Berkley* againſt *Fox*, under *Trinity* Term, 5 *Geo.* II. *Ex parte Bardwell* and others, under *Hilary* Term, 7 *Geo.* II. *Fox* againſt *Berkley*, under *Michaelmas* Term, 8 *Geo.* II. *Bardwell* againſt *Fox*, *May* 7, 1735.

Trinity Term, 3 & 4 Geo. II.

June 8, A. D. 1730.

In the *Exchequer*.

Benſon againſt *Olive*.

BILL by the impropriator of *Bromley* Saint *Leonard*'s, in the county of *Middleſex*, for tithe hay, *&c.*

Defendant not denying plaintiff's title, as impropriator for tithe hay, but ſetting up an exemption, muſt firſt prove it. *Bunb.* 284. pl. 363.

The defendant, in his anſwer, does not deny the plaintiff's title, but inſiſts upon exemption, as being parcel of one of the greater abbies, which came to the crown by ſtatute 31 *Hen.* VIII. chap. 13.

31 *Hen.* VIII.

Now upon hearing the cauſe, the Lord Chief Baron thought, that where the defendant admits the general right, and inſiſts only upon his exemption, ſuch admiſſion is ſufficient to put the defendant upon proving his exemption, and the plaintiff (although a lay impropriator) is under no neceſſity of proving payment of tithes to him.

2. A

Decree refuſed to be read, becauſe not touching the ſame lands or title.

2. A decree in 1673, was offered to be produced in evidence, wherein the then impropriator was plaintiff, and *Semain* defendant, and wherein the plaintiff's title was affirmed; but the court would not permit this decree to be read, becauſe the now plaintiff could not ſhew, that the defendant claimed either the ſame lands, or under the ſame title as *Semain*.

Miniſters accounts in 34 & 35 *Hen.* VIII. permitted to be read.

3. It was objected for the plaintiff, that the defendant's producing miniſters accounts 34 & 35 *Hen.* VIII. was not ſufficient, being ſubſequent to ſtat. 31 *Hen.* VIII. chap. 13. but that he ought to ſhew the ſurrender, or when it came to the crown; but this objection was over-ruled.

Deed forty years old proves itſelf, and no proof is required where the party had it, or how he came by it.

4. A deed was produced by the plaintiff, dated 30 *March*, 1690, and it was admitted it was old enough to be read without proof; but Baron *Carter* objected, that the plaintiff ſhould give ſome account how he came by it; but the Lord Chief Baron ſaid, he could not ſee the uſe of that, and it would be very inconvenient; for then there muſt have been an interrogatory to prove this matter by depoſitions; for it could not be inquired into on the order to prove exhibits; and the deed was read at laſt, but by conſent; though the reſt of the Barons ſeemed to be of opinion with the Lord Chief Baron.

See this caſe under *Michaelmas* Term, 5 *Geo.* II.

Deed thirty-five years old, does not prove itſelf.

5. Another deed in 1694 was offered, but objected to by the defendant, as not being old enough to prove itſelf; and *by the court*, this deed was not admitted to be read; for though ſometimes thirty-five, or even thirty years, have been thought ſufficient, yet not where it is objected to; but the uſual rule is forty years.

6. The

6. The plaintiff had brought an action on ſtatute 2 & 3 *Edw.* VI. chap. 13. and obtained a verdict, which he offered now in evidence; but it was oppoſed, becauſe this was a matter which happened after iſſue was joined in *this* court; and the plaintiff not being able to prove, that *that* trial was for the ſame lands, the court refuſed to admit it.

Verdict not proved to be touching the ſame lands, refuſed to be read.

Note; At laſt the bill was retained for a year, and the plaintiff to be at liberty to bring his action in the mean time.

Michaelmas Term, 4 Geo. II.
November 19, A. D. 1730.

In the *Exchequer*.

Hooper againſt *Lethridge* and others.

BILL by lay impropriator for tithes in *Pilton*, in the county of *Devon*; ſome of the defendants inſiſted, by their anſwer, that part of the lands, of which tithes were demanded, ought to pay tithes to Mr. *Incledon*, who was intitled to a portion of tithes in *Pilton*; other defendants inſiſted, that they were tenants to Mr. *Rolle*, and that King *Henry* the *Eighth* granted to his anceſtors their lands, and the *tithes thereof*, prior to the grant of the rectory, under which the plaintiff claimed; neither Mr. *Incledon* nor Mr. *Rolle* being made parties, it was objected, that the plaintiff could not proceed as to theſe lands reſpectively; and though Mr. *Incledon* was before the court as plaintiff in the croſs bill, yet *that* praying an exemption as to other lands; both objections were allowed *by the whole court*.

Bill diſmiſſed for want of parties. *Bunb.* 291. pl. 373.

A. D. 1730.

In the *Exchequer.*

Anonymous.

On rector compounding with parishioners for tithes, and dying before end of the year, how the proportions shall be between the successor and executor of incumbent. *Bunb.* 294. pl. 379.

A Rector agrees with a parishioner for his *tithes* for a certain sum, payable yearly at *Michaelmas*; the rector dies the beginning of *September*; the agreement determining by the death of the parson, the successor shall be intitled to tithes in kind only from the death, and the executor of the last incumbent to a proportion, according to the agreement, till the time of his testator's death; and this is by an equitable construction.

Hilary Term, 4 Geo. II.

February 18, A. D. 1730.

At *Serjeant's-Inn.*

In the *Exchequer.*

Leigh against *Maudsley.*

Held sufficient on a bill by a lay impropriator for tithes, his only proving the tithes belonged to the *Andertons*, under whom he claimed; but where a general exemption is insisted on, a partial one cannot be admitted in proof. *Bunb.* 296. pl. 380.

A Lay impropriator, by his bill, sets forth, that in the year 1724, he was seised in fee of all the impropriate tithes, in the township of *Westbaughton*, in the parish of *Dean*, in the county of *Lancaster*.

Upon

Upon the hearing, he went no further in his evidence of the title, than that about thirty-four years ago, theſe tithes were reputed to belong to the *Andertons* of *Loſtock*, under whom the plaintiff claimed: it was objected for the defendant, that here was not a ſufficient title ſhewn, ſince a layman was not capable of tithes in *pernancy*, but from the crown, ſince 32 *Hen.* VIII. chap. 7, and therefore it was incumbent on the plaintiff to ſhew how he derived them out of the crown.

And *by the whole court*, if he had ſet out in his bill a title under the crown, and derived it down, he muſt have proved it, as he had ſet it forth; but ſince he had not, this proof was ſufficient, [*which note, and quære* former practice].

The defendant, in his anſwer, inſiſted, that his lands were diſcharged, as being parcel of the poſſeſſions of the abbey of *Cockerſand*, diſſolved by ſtat. 31 *Hen.* VIII. chap. 13. but there having been ſeveral inſtances of the payment of tithes of corn in kind, they further alledged, that ſince no hay had ever been paid, that as to *that ſpecies* of tithe, they ought in all events to be diſcharged, as againſt a lay impropriator.

But *by the court*, though a defendant may in equity inſiſt on ſeveral defences, which are conſiſtent, yet having undertaken to prove a general exemption, and failing in *that*, he cannot have the benefit of the other point; ſo the defendant was decreed to account generally.

Eaſter Term, 4 Geo. II.

May 2, A. D. 1730.

In the *Houſe* of *Lords*.

John Pratt, Eſquire, — Appellant,

William Hopkins, *Benjamin Mitford*, *Henry Talbot*, and *Joſeph Farmer*, — Reſpondents,

3 *Brown* Ap. in Parl. 523. *Gr. & Rud.* Law & Eq. 338. pl. 9.

THE appellant appealed from the decree pronounced in this cauſe by the court of *Exchequer*, in *Michaelmas* Term, 2 *Geo.* II. contending, that by the expreſs words of the act, the impropriator of his leſſee, for the time being, was to have and receive all tithes of what kind ſoever, ariſing from the new incloſures, notwithſtanding any *modus* or compoſition in any other parts of the pariſh, or any exemption whatſoever, and that theſe laſt words would be of no manner of uſe, if the incloſures in *South-moor* were to be exempt from the payment of tithes, it being admitted by the reſpondents anſwer, that the other two commons ought to pay tithes; that, according to the act, a certain quantity of the commons, containing ten acres, was to be incloſed, as a better proviſion for the curate of the pariſh; but no diſtinction was ever made as to *South-moor*, ſo that the allotment might as well be made of lands in *South-moor*, as in either of the other commons; whereas if *South-moor* had been exempt from the payment of tithes, and had not been intended to be ſubject to tithes after the incloſures were made, the curate's allotment ought to have been confined to the other two commons, which were confeſſedly

feſſedly ſubject to the payment of tithes. That the impropriator and his leſſee were expreſsly obliged, as they ſhould reſpectively be entitled to the tithes of new incloſures, to pay the curate of the pariſh the yearly ſum of twelve pounds, free from all taxes, out of the ſaid tithes; whence it was plain, that the act never intended to make any diſtinction between the commons, the tithes of all new incloſures being equally made the fund for payment of this twelve pounds *per ann.* that there was expreſs ſaving in the act, that nothing therein contained ſhould extend to prejudice the right and intereſt of one Mr. *Strode*, in reſpect of an incloſure of one hundred acres, made by him in *South-moor*; and this ſaving would have been equally extended to the reſidue of the moor, unleſs it had been intended to be ſubject to the payment of tithes; that though the proprietors and owners, who had incloſed the commons, had greatly improved their own eſtates, yet it appeared from the evidence, that the rectory was thereby leſſened in value for want of ſufficient flocks of ſheep to manure the arable grounds; by which means, and by the annual payment of twelve pounds to the curate, which the appellant had conſtantly paid, he muſt be a conſiderable loſer, if excluded from the tithes of the incloſures in *South-moor*, and therefore it was hoped that the decree would be reverſed.

On the other ſide it was ſaid, that the queſtion concerned only the incloſures of the common called *South-moor*, which by the proofs in the cauſe appeared to be part of the demeſnes of the monaſtery of *Glaſtonbury*, and, as ſuch, exempt from payment of tithes: that no tithes had ever been paid for this common, though at different times improvements and incloſures had been made of ſeveral parts of it, ſo that there

was no room for the court to doubt, but that, at the time of paſſing the act, the lands in queſtion were exempted from the payment of tithes; that the firſt clauſe inſiſted on by the appellant, was only a general ſaving to the biſhop and his leſſee of their former right to tithes; and as to the latter part of that clauſe, which the appellant chiefly relied upon, acts of parliament were to have a reaſonable conſtruction; and taking the whole clauſe together, it appeared calculated meerly to preſerve the impropriator's right, notwithſtanding any pretence of a *modus*, *&c.* in other parts of the pariſh: And it would be very extraordinary by the general words, or any exemption whatſoever at the end of this clauſe, to deſtroy a clear legal exemption, when the whole drift of the clauſes was only to preſerve ſuch right as the biſhop, the impropriator, or his leſſee then had; that there could be no reaſon in this caſe to take away an exemption in favour of an impropriator, becauſe the act did not intend to diminiſh the tithes; but, on the contrary, the tithes ariſing from the improvement of the other commons, would greatly increaſe the yearly value of the impropriation.

Decree affirmed, Lord's Journ. vol. 23. p. 559.

After hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decree of diſmiſſion therein complained of, affirmed. And it was further ordered, that the appellant ſhould pay to the reſpondents thirty pounds for their coſts, in reſpect of the ſaid appeal.

END OF THE FIRST VOLUME.